

# TRACK ACCESS CONTRACT (PASSENGER SERVICES)<sup>1</sup>

Dated<sup>2</sup>

[ ]<sup>3</sup>

<sup>1</sup> All cross references to the HAL Network Code (including defined terms, Parts and Conditions) in this contract will need to be reviewed and updated as necessary once the HAL Network Code is finalised as part of this regulation 29/30 application.

<sup>2</sup> References to Network Rail have been changed to Heathrow Airport Limited throughout to reflect that HAL is the infrastructure manager (for the purposes of The Railways Infrastructure (Access and Management) Regulations 2005) of the Heathrow Rail Infrastructure. HAL has indicated to TfL that it intends to enter into an infrastructure management agreement with Network Rail Infrastructure Limited under which HAL will subcontract the vast majority of the day-to-day management, operation and maintenance of the track to Network Rail. TfL has no issue in principle with HAL subcontracting its obligations. TfL does however have concerns as to how this structure will work in practice, specifically in relation to:

- Events of Default, including how the insolvency of Network Rail and/or Network Rail's failure to perform its obligations under the subcontract will impact on this contract;
- charging, specifically how HAL will effectively manage Network Rail's costs;
- how day-to-day operations will be managed in practice; specifically what mechanisms will be in place to enable the Train Operator to liaise with Network Rail;
- as Network Rail will continue to act as the infrastructure manager of the Great Western Main Line, ensuring that no conflicts of interest arise between that role and the role of subcontractor to HAL; and
- whether HAL or Network Rail will hold the required safety authorisation in this context (and so be the infrastructure manager for the purposes of the The Railways and Other Guided Transport Systems (Safety) Regulations 2006).

HAL confirmed at a meeting with TfL on 25 November 2015 that it would not append its infrastructure management agreement with Network Rail to this contract and that it would instead report back with an alternative proposal as to how TfL could have visibility of, and contractual rights in connection with, HAL's arrangement with Network Rail. TfL has yet to receive this proposal. Once the scope of Network Rail's role is confirmed, this contract may need to be updated to incorporate interface arrangements between HAL, TfL/MTR and Network Rail.

<sup>3</sup> HAL is exempt from the requirement to hold a network licence in respect of the Heathrow Rail Infrastructure. The implication of this is that HAL is not subject to the obligations that are imposed by such licences (for example obligations in respect of asset stewardship, the environment and passenger information). Without such obligations in place, there is a risk to track users (and ultimately the passengers) that HAL will not put in place the necessary processes and safeguards to ensure a smooth and safe operation of the Heathrow Rail Infrastructure. This is of great concern to TfL, and should be of concern to the ORR in respect of protecting the interests of users and passengers. The inclusion of "surrogate licence conditions" (i.e. contractual provisions which replicate certain aspects of a typical licence) was discussed with HAL during meetings in November and December 2015 and it was agreed that the Network Rail licence conditions would be reviewed to determine which obligations TfL reasonably expected to be included within access documentation. HAL originally agreed to undertake this work but after weeks of filibustering, flatly declined, at which stage TfL undertook its own review and provided its proposals to HAL at the start of 2016. As a result of this work, TfL has included in this contract certain obligations equivalent to the licence conditions that it reasonably considers should be included within a track access contract. For further detail and rationale, please

**Between<sup>4</sup>**

**HEATHROW AIRPORT LIMITED**

**and**

**TRANSPORT FOR LONDON OR A RAILWAY UNDERTAKING NOMINATED BY  
TRANSPORT FOR LONDON (CURRENTLY MTR CORPORATION (CROSSRAIL)  
LIMITED)**

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see our comments on Clauses 4, 6, and 7. The inclusion of “surrogate licence conditions” will need to be accompanied by effective remedies in the event that HAL does not comply with the obligations imposed. TfL considers that users of the Heathrow Rail Infrastructure should be entitled not only to damages where HAL fails to meet its obligations but also a process to compel performance by HAL of those obligations, as due to the nature of the obligations and the monopoly nature of this essential facility, HAL is ultimately the only person who can provide (or procure) the access and services. TfL has also proposed the inclusion of a new indemnity in Clause 10.2 for a breach of these “surrogate licence conditions”, similar to the existing indemnities for breach of Safety Obligations and in relation to Environmental Damage. Please see our comments on Clause 10.2 for further detail.

<sup>4</sup> HAL has advised TfL that traction electricity (EC4T) would be charged under the Network Rail Track Access Agreement for the Great Western Main Line for both EC4T used on the Network Rail network and EC4T used on the Heathrow Rail Infrastructure (with amendments being required to both the Network Rail Great Western track access agreement and this contract to acknowledge this). This is acceptable to TfL in principle provided that there is no duplication in charging between HAL and Network Rail and subject to Network Rail being entitled and willing to do so. In early April 2016, HAL and Network Rail circulated a proposal for how EC4T and electrification asset usage charges for the Heathrow Rail Infrastructure were to operate. TfL has identified a number of potential issues with this proposal and the details and suitability of this proposal are still being worked through with the relevant parties. References to Traction Electricity and the Traction Electricity Rules have therefore been retained in this contract pending resolution on these arrangements, given that ultimately HAL should be required to provide traction electricity for the use of its infrastructure. To the extent that the arrangements proposed by HAL and Network Rail are not viable, EC4T will need to be provided and paid for pursuant to this contract.

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THIS CONTRACT is made the [ ] day of [Month Year]

BETWEEN:

- (1) Heathrow Airport Limited, a company registered in England under number 1991017 having its registered office at The Compass Centre, Nelson Road, Hounslow, Middlesex, TW6 2GW (“**HAL**”); and
- (2) Transport for London or a railway undertaking nominated by Transport for London (currently MTR Corporation (Crossrail) Limited), a body established under the Greater London Authority Act 1999 having its registered office at Windsor House, 42-50 Victoria Street, London, SWH 0TL (the “**Train Operator**”).

WHEREAS:

- (A) HAL is the owner of the Network;
- (B) HAL is exempt from the requirement under section 7 of the Act to be authorised by a licence granted under section 8 of the Act to be the operator of the Network<sup>6</sup>;
- (C) HAL has agreed to grant to the Train Operator permission to use certain track comprised in the Network on the terms and conditions of this contract; and
- (D) HAL has or intends to appoint Network Rail to perform certain of HAL’s obligations under this contract<sup>7</sup>.

IT IS AGREED AS FOLLOWS:

## 1 INTERPRETATION

### 1.1 Definitions

In this contract unless the context otherwise requires:

“**Access Agreement**” has the meaning ascribed to it in Part A of the HAL Network Code;

8

<sup>6</sup> TfL has included this additional recital given the existence of the exemption is key to the arrangements proposed by HAL.

<sup>7</sup> As noted on the front cover, we understand that HAL intends to subcontract the vast majority of the day-to-day management, operation and maintenance of the Network to Network Rail. This recital has been included to reflect this arrangement.

<sup>8</sup> The process of periodic review of track access charges cannot refer to Schedule 4A of the Railways Act 1993 as this relates to the periodic review of Network Rail charges only. TfL and HAL discussed, in outline, how periodic review would work during meetings in November and December 2015, although HAL was not willing to discuss any matters relating to charging pending the outcome of the ORR’s decision on the charging framework. No proposal was forthcoming from HAL following these discussions. TfL has included in Schedule 8 principles for how it considers the charging and periodic review regime should operate under this contract. This is consistent with the charging framework proposed to be established by the ORR.

**“Access Dispute Resolution Rules”** and **“ADRR”** have the meaning ascribed to them in Part A of the HAL Network Code;

**“Access Proposal”** has the meaning ascribed to it in Part D of the HAL Network Code;

**“Act”** means the Railways Act 1993;

**“Affected Party”** has the meaning ascribed to it in Clause 17.1;

**“Affiliate”** means, in relation to any company:

- (a) a company which is either a holding company or a subsidiary of such company; or
- (b) a company which is a subsidiary of a holding company of which such company is also a subsidiary,

and for these purposes “holding company” and “subsidiary” have the meanings ascribed to them in section 1159 of the Companies Act 2006;

**“Ancillary Movements”** has the meaning ascribed to it in Part D of the HAL Network Code;

**“Applicable HAL Engineering Access Statement”** means the HAL Engineering Access Statement in force in respect of the Network on the date on which Services may first be operated by the Train Operator under this contract, as from time to time amended or replaced under Part D of the HAL Network Code;

**“Applicable Timetable Planning Rules”** means the HAL Timetable Planning Rules in force in respect of the Network on the date on which Services may first be operated by the Train Operator under this contract, as from time to time amended or replaced under Part D of the HAL Network Code;

**“Applicable Timetable”** has the meaning ascribed to it in Schedule 8;

**“associate”** has the meaning ascribed to it in section 17 of the Act;

**“Claims Allocation and Handling Agreement”** means the agreement of that name approved by ORR;

**“Collateral Agreements”** means the agreements and arrangements listed in Schedule 3;

**“Concession Agreement”** means the concession agreement between Rail for London Limited and the Train Operator more particularly described in Schedule 3;<sup>9</sup>

<sup>9</sup>

TfL has prepared this agreement on the basis that it will apply only in relation to the Crossrail services. Crossrail services are let by TfL / RfL under a concession agreement. This has therefore been updated to reflect the Crossrail operation. TfL acknowledges that franchising could be relevant in future for any franchises which use the Heathrow Rail Infrastructure.

**“Concessionaire”** means the person defined as such in the Concession Agreement;

**“Confidential Information”** means information relating to the affairs of one party to this contract or any of its Affiliates which has been provided by any such person to the other party under or for the purposes of this contract, or any matter or thing contemplated by this contract or to which this contract relates, the disclosure of which is likely materially to compromise or otherwise prejudice the commercial interests of any such person;

**“contract”** means this document including all schedules and appendices to it, the HAL Network Code and the Traction Electricity Rules;

**“D-X”** has the meaning ascribed to it in Part D of the HAL Network Code;

**“Default Interest Rate”** is two percent above the base lending rate of Barclays Bank PLC as varied from time to time;

**“Environmental Condition”** has the meaning ascribed to it in Part E of the HAL Network Code;

**“Environmental Damage”** has the meaning ascribed to it in Part E of the HAL Network Code;

**“European licence”** has the meaning ascribed to it in section 6(2) of the Act;

**“Event of Default”** means a Train Operator Event of Default or a HAL Event of Default;

**“Expiry Date”** means [x May 2028]<sup>10</sup>;

**“Force Majeure Event”** has the meaning ascribed to it in Clause 17.1;

**“Force Majeure Notice”** has the meaning ascribed to it in Clause 17.1;

**“Force Majeure Report”** has the meaning ascribed to it in Clause 17.1;

**“HAL Event of Default”** has the meaning ascribed to it in paragraph 1.3 of Schedule 6;<sup>11</sup>

<sup>10</sup>

This date should be consistent with the date that the exemption granted to HAL in respect of the requirement to hold a network licence expires (i.e. 30 years from the date when services commenced on the Network), as HAL will need to apply for a licence or another exemption and have either in effect from this date. This will require amendment to the form of track access agreement – particularly if HAL becomes regulated under sections 17 and 18 of the Railways Act 1993. Further clarity will be required around the arrangements that will be in place when HAL’s exemption is revoked, expired or renewed as the Train Operator and other related parties will need to know which set of arrangements they are operating under in any transition period. TfL recognises that this expiry date extends the term of the contract beyond the length of the Crossrail concession granted to the Train Operator as set out in the Concession Agreement but notes that the successor operator will still require access to the Network and considers this additional period to be appropriate. The contract will be novated to the successor operator in due course. Please also see the “mandatory Proposal for Change” process set out in the HAL Network Code and HAL Station Access Conditions forming part of this regulation 29/30 application.

<sup>11</sup>

This is simply an amendment from the definition of Network Rail Event of Default to HAL Event of Default.

**“HAL Network Code”** means the document by that name published by HAL;<sup>12</sup>

**“Innocent Party”** means, in relation to a breach of an obligation under this contract, the party who is not in breach of that obligation;

**“Insolvency Event”**, in relation to either of the parties, has occurred where:

- (a) any step which has a reasonable prospect of success is taken by any person with a view to its administration under Part II of the Insolvency Act 1986;
- (b) it stops or suspends or threatens to stop or suspend payment of all or a material part of its debts, or is unable to pay its debts, or is deemed unable to pay its debts under section 123(1) or (2) of the Insolvency Act 1986, except that in the interpretation of this paragraph:
  - (i) section 123(1)(a) of the Insolvency Act 1986 shall have effect as if for “£750” there were substituted “£100,000” or such higher figure as the parties may agree in writing from time to time; and
  - (ii) it shall not be deemed to be unable to pay its debts for the purposes of this paragraph if any such demand as is mentioned in section 123(1)(a) of the Insolvency Act 1986 is satisfied before the expiry of 21 days from such demand;
- (c) its directors make any proposal under section 1 of the Insolvency Act 1986, or it makes any agreement for the deferral, rescheduling or other readjustment (or makes a general assignment or an arrangement or composition with or for the benefit of the relevant creditors) of all or a material part of its debts, or a moratorium is agreed or declared in respect of or affecting all or a material part of its debts;
- (d) any step is taken to enforce security over or a distress, execution or other similar process is levied or sued out against the whole or a substantial part of its assets or undertaking, including the appointment of a receiver, administrative receiver, manager or similar person to enforce that security;
- (e) any step is taken by any person with a view to its winding up or any person presents a winding-up petition which is not dismissed within 14 days, or it ceases or threatens to cease to carry on all or a material part of its business, except for the purpose of and followed by a reconstruction, amalgamation, reorganisation, merger or consolidation on terms approved by the other party before that step is taken (which approval shall not be unreasonably withheld or delayed); or

<sup>12</sup>

This is simply an amendment from the definition of Network Code to HAL Network Code.

(f) any event occurs which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above,

unless:

- (i) in any case, a railway administration order (or application for such order) has been made or such order (or application) is made within 14 days after the occurrence of such step, event, proposal or action (as the case may be) in relation to the party in question under section 60, 61 or 62 of the Act and for so long as any such order (or application) remains in force or pending; or
- (ii) in the case of paragraphs (a), (d) and (e), the relevant petition, proceeding or other step is being actively contested in good faith by that party with timely recourse to all appropriate measures and procedures;

**“Liability Cap”** has the meaning ascribed to it in paragraph 1 of Schedule 9;

13

**“Network”** has the meaning ascribed to it in Part A of the HAL Network Code and further described in Schedule 2;

**“Network Rail”** means Network Rail Infrastructure Limited, a company registered in England under number 2904587 having its registered office at 1 Eversholt Street, London, NW1 2DN;

**“New Working Timetable”** means, in respect of any day, the version of the Working Timetable for that day provided by HAL in accordance with Condition D2.7.1, as amended pursuant to Condition D2.7.4;

**“Office of Rail and Road”** has the meaning ascribed to it under section 15 of the Railways and Transport Safety Act 2003, and references to **“ORR”** shall be construed as references to the Office of Rail and Road;

**“Operations Agent”** means at the date of this Agreement, Network Rail or such other suitably qualified and competent party as may be appointed by HAL from time to time;<sup>14</sup>

**“Performance Order”** has the meaning ascribed to it in Clause 13.3.2;

**“Railway Code Systems”** means necessary systems within the meaning of the Systems Code;

13

The definition of Longstop Date is no longer applicable given the amendments to Clause 3 (Conditions Precedent and Duration). Please see our comments on Clause 3 below.

14

This definition has been included to reflect that HAL is intending to subcontract the majority of its obligations under this contract to Network Rail. TfL notes that an equivalent concept has been proposed for the stations access agreements as part of this regulation 29/30 application where HAL is intending to subcontract the majority of its obligations to Heathrow Express Operating Company Limited.

**“Railway Group Standards”** has the meaning ascribed to it in Part A of the HAL Network Code;<sup>16</sup>

**“relevant ADRR Forum”** means the Forum, having the meaning ascribed to it in the ADRR, to which a Relevant Dispute is allocated for resolution in accordance with the ADRR;

**“Relevant Dispute”** means any difference between the parties arising out of or in connection with this contract;

**“Relevant Force Majeure Event”** has the meaning ascribed to it in Clause 17.1;

**“Relevant Losses”** means, in relation to:

- (a) a breach of this contract; or
- (b) in the case of Clause 10, any of the matters specified in Clause 10.1(a), (b) or (c) or Clause 10.2(a), (b) or (c) (each a “breach” for the purpose of this definition); or
- (c) in the case of Schedule 8, the matter specified in paragraph 18 of Schedule 8 (a “breach” for the purposes of this definition only),

all costs, losses (including loss of profit and loss of revenue), expenses, payments, damages, liabilities, interest and the amounts by which rights or entitlements to amounts have been reduced, in each case incurred or occasioned as a result of or by such breach;

**“Relevant Obligation”** has the meaning ascribed to it in Clause 17;

**“Rolled Over Access Proposal”** has the meaning ascribed to it in Part D of the HAL Network Code;

<sup>17</sup>**“safety authorisation”** has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

**“safety certificate”** has the meaning ascribed to it by regulation 2 of the Railways and Other Guided Transport Systems (Safety) Regulations 2006;

**“Safety Obligations”** means all applicable obligations concerning health and safety (including any duty of care arising at common law, and any obligation

<sup>15</sup> The definition of railway facility has been deleted as the defined term is not used in this contract.

<sup>16</sup> HAL advised TfL by email dated 24 March 2016 that it does not consider it necessary to produce equivalents to the Network Rail standards for the Heathrow Rail Infrastructure as these are not relevant. TfL’s understanding is therefore that the standards applicable on the Network Rail Network are to apply.

<sup>17</sup> The definition of Routes is not relevant in this context as access to the whole Network is relevant given the size of the Network. This definition has therefore been deleted and consequential amendments have been made throughout the contract to refer to “Network”.

arising under statute, statutory instrument or mandatory code of practice) in Great Britain;

**“Services”** means the railway passenger services specified in Schedule 5;

**“SNRP”** has the meaning ascribed to it in the Railways (Licensing of Railway Undertakings) Regulations 2005;

**“Specified Equipment”** means the railway vehicles which the Train Operator is entitled to use in the provision of Services as specified in paragraph 5.1 of Schedule 5;

18

**“Stabling”** means the parking or laying up of the Specified Equipment or such other railway vehicles as the Train Operator is permitted by this contract to use on the Network, such parking or laying up being necessary or reasonably required for giving full effect to the movements of Specified Equipment required for the provision of the Services;

**“Suspension Notice”** means a notice in writing served by the relevant party on the other party under paragraph 2 of Schedule 6;

**“Systems Code”** means the code of practice relating to the management and development of railway code systems used by Network Rail in respect of the Network Rail Network as amended from time to time in accordance with its terms;<sup>19</sup>

**“Termination Notice”** means a notice in writing served by the relevant party on the other party under paragraph 3 of Schedule 6;

**“Timetable Participant”** shall have the meaning ascribed to it in Part D of the HAL Network Code;

**“Track Charges”** means the charges payable by or on behalf of the Train Operator to HAL, as set out in Schedule 7 or under the Traction Electricity Rules;

**“Traction Electricity Rules”** means the document known as the Traction Electricity Rules published by Network Rail on its website and as may be amended from time to time;

18

Reference to SPP Threshold in the context of performance has been deleted in this contract at this stage, pending preparation of Schedule 8. TfL's principles for a performance regime are set out in Schedule 8 to this contract.

19

HAL advised TfL by email dated 24 March 2016 that it has amended the Network Rail systems code to reflect the characteristics of the Heathrow Rail Infrastructure (although we have not been provided with the nature of these amendments). As HAL has not provided this document to TfL for review, this definition and Clause 6.4 (Use of Railway Code Systems) remains subject to further comment by TfL pending review of the updated Systems Code. We note that if HAL has in fact produced its own Systems Code this definition may need to be updated to reflect this.



**“Train Operator Event of Default”** has the meaning ascribed to it in paragraph 1.1 of Schedule 6;

**“Train Slot”** has the meaning ascribed to it in Part D of the HAL Network Code;

**“TW-X”** has the meaning ascribed to it in Part D of the HAL Network Code;

**“Value Added Tax”** means value added tax as provided for in the Value Added Tax Act 1994, and any tax similar or equivalent to value added tax or any turnover tax replacing or introduced in addition to them, and “VAT” shall be construed accordingly;

**“Working Day”** has the meaning ascribed to it in Part A of the HAL Network Code; and

**“Working Timetable”** has the meaning ascribed to it in Part A of the HAL Network Code.

## 1.2 Interpretation

In this contract, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) any one gender includes the other;
- (c) all headings are for convenience of reference only and shall not be used in the construction of this contract;
- (d) reference to an item of primary or secondary legislation is to that item as amended or replaced from time to time;
- (e) reference to a contract, instrument or other document is to that contract, instrument or other document as amended, novated, supplemented or replaced from time to time;
- (f) reference to a party is to a party to this contract, its successors and permitted assigns;
- (g) reference to a recital, Clause or Schedule is to a recital, clause or schedule of or to this contract; reference in a schedule to a Part of or an Appendix to a schedule is to a part of or an appendix to the schedule in which the reference appears; reference in a Part of a Schedule to a paragraph is to a paragraph of that part; reference to a Part of an appendix is to a part of the appendix in which the reference appears; and reference in a schedule to a Table is a reference to the table included in or annexed to that schedule;

- (h) where a word or expression is defined, cognate words and expressions shall be construed accordingly;
- (i) references to the word “person” or “persons” or to words importing persons include individuals, firms, corporations, government agencies, committees, departments, authorities and other bodies incorporated or unincorporated, whether having separate legal personality or not;
- (j) “otherwise” and words following “other” shall not be limited by any foregoing words where a wider construction is possible;
- (k) the words “including” and “in particular” shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (l) words and expressions defined in the Railways Act 1993, the Railways and Other Guided Transport Systems (Safety) Regulations 2006<sup>21</sup> and [The Railways Infrastructure (Access and Management) Regulations 2005]<sup>22</sup> shall, unless otherwise defined in this contract, have the same meanings in this contract;
- (m) any reference to the term “possession”, either by itself or as part of any composite definition, shall be construed as a reference to a Restriction of Use [as defined in Schedule 4]<sup>23</sup>;
- (n) words and expressions defined in the HAL Network Code shall have the same meanings in this contract;
- (o) if there is any conflict of interpretation between this contract and the HAL Network Code, the HAL Network Code shall prevail;
- (p) words and expressions defined in the Traction Electricity Rules shall have the same meanings in this contract; and
- (q) if there is any conflict of interpretation between this contract (not including the Traction Electricity Rules) and the Traction Electricity Rules, the following order of precedence shall apply: (1) the Traction Electricity Rules; and (2) this contract (not including the Traction Electricity Rules).

<sup>21</sup> Note: HAL is currently exempt from the requirement to hold a network licence. If such exemption were to be withdrawn or expire, this provision would need to be updated.

<sup>22</sup> This should be updated to reflect the applicable legislation at the time this contract is to be entered into, noting that the DfT proposes to introduce replacement regulations.

<sup>23</sup> To be confirmed once the detail of Schedule 4 has been prepared.

### **1.3 Indemnities**

Indemnities provided for in this contract are continuing indemnities in respect of the Relevant Losses to which they apply, and hold the indemnified party harmless on an after tax basis.

## **2 HAL NETWORK CODE AND TRACTION ELECTRICITY RULES**

### **2.1 Incorporation**

The HAL Network Code and the Traction Electricity Rules are incorporated in and form part of this contract.

### **2.2 Modifications to the HAL Network Code or the Traction Electricity Rules**

If either the HAL Network Code or the Traction Electricity Rules or both are modified at any time, Schedule 10 shall have effect.

### **2.3 Compliance by other operators**

Except where ORR has directed otherwise in the exercise of its powers under the Act or the HAL Network Code, and except in relation to London Underground Limited<sup>24</sup> to the extent that such persons are not party to the HAL Network Code, HAL shall ensure that all operators of trains having permission to use any track comprised in the Network agree to comply with the HAL Network Code.

## **3 CONDITIONS PRECEDENT AND DURATION<sup>25</sup>**

### **3.1 Effective date**

The provisions of this contract, other than Clause 5, take effect from the signature of this contract. Clause 5 shall take effect on [28 May 2018]<sup>26</sup>.

<sup>24</sup> HEOC will be party to the HAL Network Code and must be bound by the multilateral provisions.

<sup>25</sup> Given the unwillingness of HAL to meaningfully engage with TfL in negotiating this contract (leading to the need for the regulation 29/30 application to be brought), it is not acceptable to TfL that this contract would lapse if HAL was not to satisfy its conditions precedent by the relevant date; indeed TfL considers this to be a likely outcome if HAL would incur no liability by doing so. Clause 3 has therefore been redrafted on the basis that each party has a period between the date the contract is signed (when all clauses other than Clause 5 will come into effect) and the date specified in Clause 3.1 (when Clause 5 is scheduled to come into effect) in order to satisfy their respective conditions precedent. A failure to satisfy any conditions precedent by this date will constitute an Event of Default for which damages may be claimed (i.e. for costs incurred as a result of not being able to access the Network). Consequential amendments have also been made to Clause 14.3 and Schedule 6.

<sup>26</sup> This start date is consistent with the intended start date of the Crossrail services to Heathrow. As discussed in footnote 70 below, at this stage TfL is seeking rights for the passenger services from May 2018, with a limited number of driver training rights from 2017. Access rights for testing and pre-service access will also be required (which would allow for access during 2017). Planning is still taking place in relation to the additional rights which may be needed for driver training, mileage accumulation, trial operations and trial running and additional rights may be required in due course. If such access rights are not granted pursuant to a separate agreement, this contract will need to be updated to allow for earlier access for these purposes. Please see footnote 70 below for further comments on earlier access rights required for driver training.

### **3.2 Conditions precedent**

The following conditions precedent are to be satisfied in full by the date specified in Clause 3.1:

- (a) to the extent required by the Act and/or the Railways (Licensing of Railway Undertakings) Regulations 2005, the Train Operator is authorised to be the operator of trains for the provision of the Services by:
  - (i) a licence granted under section 8 of the Act; and/or
  - (ii) a European licence and corresponding SNRP;
- (b) HAL is authorised by a licence granted under section 8 of the Act to be the operator of the Network or is exempt from the requirement to be so authorised under section 7 of the Act;
- (c) each of the Collateral Agreements is executed and delivered by all the parties to each such agreement and is unconditional in all respects (save only for the fulfilment of any condition relating to this contract becoming unconditional);
- (d) the Train Operator and HAL (or the Operations Agent, as applicable)<sup>27</sup> each has, as necessary, a valid safety certificate or safety authorisation as required by the Railways and Other Guided Transport Systems (Safety) Regulations 2006 and has established and is maintaining a safety management system which meets the requirements of those Regulations; and
- (e) the provisions of this contract, other than Clause 5, have taken effect in accordance with Clause 3.1.

### **3.3 Obligations to satisfy conditions precedent to Clause 5**

Each party shall use all reasonable endeavours to secure that the following conditions precedent are satisfied as soon as practicable, and in any event not later than the date specified in Clause 3.1:

- (a) in the case of HAL, the conditions precedent contained in, Clause 3.2(b) and, insofar as within its control, Clauses 3.2(c) and 3.2(d); and
- (b) in the case of the Train Operator, the conditions precedent contained in Clause 3.2(a) and, insofar as within its control, Clauses 3.2(c) and 3.2(d).

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<sup>27</sup>

As noted above in footnote 2, depending on the scope of obligations that HAL subcontracts to Network Rail, Network Rail may be required to obtain the relevant safety authorisation instead of HAL. To ensure that this condition precedent references the correct party it has been updated to require either HAL or the Operations Agent (as applicable) to obtain the required safety authorisation.

### **3.4 Consequences of non-fulfilment of conditions precedent to Clause 5**

If the conditions precedent set out in Clause 3.2 have not been satisfied in full on or before the date specified in Clause 3.1:

- (a) this shall constitute a HAL Event of Default where HAL was responsible for satisfying the outstanding condition precedent in accordance with Clause 3.3(a);
- (b) this shall constitute a Train Operator Event of Default where the Train Operator was responsible for satisfying the outstanding condition precedent in accordance with Clause 3.3(b); and
- (c) other than Clause 5, the contract shall continue in full force and effect. Clause 5 shall take effect on the date the outstanding condition(s) precedent is satisfied.

### **3.5 Expiry**

This contract shall continue in force until the earliest of:

- (a) termination under Schedule 6; and
- (b) 0159 hours on the Expiry Date.

### **3.6 Suspension and termination**

Schedule 6 shall have effect.

## **4 STANDARD OF PERFORMANCE**

### **4.1 General standard**

Without prejudice to all other obligations of the parties under this contract, each party shall, in its dealings with the other for the purpose of, and in the course of performance of its obligations under, this contract, act with due efficiency and economy and in a timely manner with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced:

- (a) network owner and operator (in the case of HAL); and
- (b) train operator (in the case of the Train Operator).

### **4.2 Good faith**

The parties to this contract shall, in exercising their respective rights and complying with their respective obligations under this contract (including when conducting any discussions or negotiations arising out of the application of any provisions of this contract or exercising any discretion under them), at all times act in good faith.

### **4.3 Non-discrimination<sup>28</sup>**

### **4.4 Cooperation<sup>29</sup>**

### **4.5 Provision of information<sup>30</sup>**

## **5 PERMISSION TO USE**

### **5.1 Permission to use the Network**

HAL grants the Train Operator permission to use the Network.

### **5.2 Meaning**

References in this contract to permission to use the Network shall, except where the context otherwise requires, be construed to mean permission:

- (a) to use the track comprised in the Network for the provision of the Services using the Specified Equipment;
- (b) to use the track comprised in the Network in order to implement any plan established under Part H of the HAL Network Code;
- (c) to make Ancillary Movements;
- (d) to Stable, which shall be treated, for the purposes of Part D of the HAL Network Code, as the use of a Train Slot;
- (e) for the Train Operator and its associates to enter upon the Network, with or without vehicles; and
- (f) for the Train Operator and its associates to bring things onto the Network and keep them there,

and such permission is subject, in each case and in all respects to:

- (i) the HAL Network Code;
- (ii) the Applicable HAL Engineering Access Statement; and

<sup>28</sup>

As HAL is exempt from the requirement under section 8 of the Railways Act 1993 to hold a licence authorising it to operate the Heathrow Rail Infrastructure, it is not subject to the obligations that are imposed by such licences. As HEOC is a subsidiary of HAL, the absence of a licence obligation requiring HAL to not discriminate is of particular concern to TfL. TfL therefore considers that an obligation on HAL not to discriminate should be included.

<sup>29</sup>

Further to the above footnote, TfL is concerned, in the absence of a licence obligation requiring HAL to cooperate with relevant authorities and third parties, that HAL may not act in a prudent manner as infrastructure manager. Accordingly, TfL proposes that an obligation to this effect be included to address this concern.

<sup>30</sup>

HAL should provide information to the Train Operator demonstrating how its governance structure and decision making (particularly in relation to capacity allocation and charging and who takes those decisions) meets the requirements of the Railways Infrastructure (Access and Management) Regulations 2005 (or their replacement, as the case may be) – both at the outset of this contract and on an ongoing basis during the term of this contract. Despite repeated requests from TfL, HAL has refused to provide this information, which is essential to make sure there is full separation from those making decisions in relation to HEOC. TfL therefore requires that an obligation of this nature be included in the contract.

(iii) the Applicable HAL Timetable Planning Rules.

### **5.3 Permission under Clauses 5.2(e) and 5.2(f)**

In relation to the permissions specified in Clauses 5.2(e) and 5.2(f):

- (a) the Train Operator shall, and shall procure that its associates shall, wherever reasonably practicable, first obtain the consent of HAL, which consent shall not be unreasonably withheld or delayed;
- (b) the Train Operator shall remove any vehicle or other thing so brought onto any part of the Network when reasonably directed to do so by HAL; and
- (c) whilst exercising any rights conferred by Clauses 5.2(e) and 5.2(f), the Train Operator shall, and shall procure that its associates shall, comply with such reasonable restrictions or instructions as HAL shall specify.

### **5.4 Changes to Applicable HAL Engineering Access Statement and Applicable HAL Timetable Planning Rules**

Changes to the Applicable HAL Engineering Access Statement and the Applicable HAL Timetable Planning Rules are subject to regulatory protection (including appeals) in accordance with Part D of the HAL Network Code.

### **5.5 [NOT USED]<sup>31</sup>**

### **5.6 The Services and the Specified Equipment**

Schedule 5 shall have effect.

### **5.7 Performance**

Schedule 8 shall have effect.

### **5.8 Stabling**

Without prejudice to HAL's obligations, if any, under Schedule 5 to provide Stabling, HAL shall use all reasonable endeavours to provide such Stabling facilities as are necessary or expedient for or in connection with the provision of the Services in accordance with the Working Timetable.

<sup>31</sup> Please see our comments on Schedule 4 below.

## **6 OPERATION AND MAINTENANCE OF TRAINS AND NETWORK**

### **6.1 General<sup>32</sup>**

Without prejudice to the other provisions of this contract:

- (a) the Train Operator shall maintain and operate the Specified Equipment used on the Network in accordance with Clause 4.1 with a view to permitting the provision of the Services on the Network in accordance with the Working Timetable and the making of Ancillary Movements; and
- (b) HAL shall maintain and operate the Network in accordance with Clause 4.1 so as to permit the provision of the Services on the Network using the Specified Equipment in accordance with the Working Timetable and the making of Ancillary Movements.

### **6.2 Trespass, vandalism and animals**

Without prejudice to the other provisions of this contract, each of the parties shall use all reasonable endeavours (including participating in such consultation and joint action as is reasonable in all the circumstances) to reduce:

- (a) trespass;
- (b) vandalism; and
- (c) intrusions on to the Network by animals,

in each case as may affect either the provision of the Services or the Network.

### **6.3 Safety**

In relation to Safety Obligations:

- (a) the Train Operator shall comply with any reasonable request by HAL in relation to any aspect of the Train Operator's operations which affects or is likely to affect the performance of HAL's Safety Obligations; and
- (b) HAL shall comply with any reasonable request by the Train Operator in relation to any aspect of HAL's operations which affects or is likely to affect the performance of the Train Operator's Safety Obligations.

### **6.4 Use of Railway Code Systems**

The parties shall:

<sup>32</sup>

HAL should be required to operate, maintain, renew and replace the track infrastructure to a specified standard. This should be in accordance with best practice and in a timely, efficient and economical manner so as to satisfy the reasonable requirements of users of the track. In a meeting with TfL on 2 December 2015, HAL advised that they would provide further information on their proposed asset stewardship provisions. TfL has yet to receive this information. In the absence of a licence, there would otherwise be no asset stewardship obligation and therefore TfL requires HAL to be contractually obligated to renew and replace the Network in accordance with certain standards. Accordingly, TfL proposes that Clause 6.1 be updated to include asset stewardship obligations, both for the benefit of track users and their passengers.



(a) use the Railway Code Systems in their dealings with each other in connection with matters provided for in this contract; and

(b) comply with the Systems Code<sup>33</sup>.

34

## **6.5 Railway Group Standards<sup>35</sup>**

## **6.6 Maintenance Strategy and Delivery Plans<sup>36</sup>**

## **6.7 Environment<sup>37</sup>**

## **6.8 Passenger Information<sup>38</sup>**

33

As discussed above in relation to the definition of Systems Code, HAL has not provided TfL with a copy of HAL's proposed Systems Code and Clause 6.4 therefore remains subject to this review.

34

Please see our comments on the definition of Train Consist Data above.

35

As HAL does not have a licence, TfL requires a contractual commitment from HAL to comply with Railway Group Standards.

36

TfL requires assurance that the Network will be properly maintained by HAL as this is in the interests of all passengers. In the absence of a licence, HAL should be contractually required to:

- (i) consult upon, take into account the views of users and subsequently publish its asset maintenance strategy and delivery plans;
- (ii) prepare delivery plans setting out how the overarching obligations on asset stewardship will be met;
- (iii) reflect the asset maintenance strategy and delivery plans in the costs for using the track (i.e. ensuring costs can be updated to reflect this – this will need to be incorporated into the Track Charges regime, the principles of which are set out in Schedule 7);
- (iv) implement the asset maintenance strategy/plans in accordance with their terms;
- (v) incorporate the requirement for an asset register to be maintained and updated; and
- (vi) ensure that users of the track have effective remedies if HAL does not maintain the track either to the standard specified in this contract or in accordance with the above maintenance strategy and plans.

37

Protection of the environment is a key aspect of the Network Rail network licence and this matter is important to TfL in its capacity of body responsible for transport in London. Assurance is required in TfL's key contracts (of which this will be one) that an adequate policy is in place and implemented by HAL. HAL should be contractually required to:

- (i) have a written environmental policy designed to protect the environment from the activities associated with the Heathrow Rail Infrastructure;
- (ii) have operational objectives and management arrangements in place to give effect to its environmental policy;
- (iii) review on a regular basis, consult upon and update the environmental policy, objectives and arrangements; and
- (iv) in undertaking its obligations under this contract, have regard to the policy and objectives and use reasonable endeavours to operate the arrangements effectively.

TfL also proposes a Part E in the Network Code (which has not been included in the documentation prepared by HAL).

38

In the absence of a licence, TfL requires contractual assurance that HAL will provide appropriate information to passengers / TfL / RfL / adjoining infrastructure managers (as this is in the best interest of users of the railway). Accordingly, HAL should be subject to additional obligations in respect of passenger information, including:

- (i) a general obligation to cooperate with users of the Heathrow Rail Infrastructure;
- (ii) requiring HAL (through its subcontractor) to secure the provision of appropriate, accurate and timely information relating to planned and actual movements of trains on the Heathrow Rail Infrastructure;

## **7 TRACK CHARGES AND OTHER PAYMENTS**

### **7.1 Track Charges and Other Payments**

Schedule 7 shall have effect.

### **7.2 Cross-subsidy**

HAL shall not:

- (a) receive a cross-subsidy from or give a cross-subsidy to any Affiliate; or
- (b) receive any other form of cross-subsidy,

in relation to the Network or any railway services provided by an Affiliate.<sup>39</sup>

### **7.3 Accounting Records<sup>40</sup>**

HAL shall prepare accounting records (including profit and loss accounts and balance sheets) in relation to its functions as the infrastructure manager of the Network and associated stations that are separate from accounting records in relation to any other businesses engaged in by HAL or its Affiliates (including any affiliated railway undertaking).

## **8 LIABILITY**

### **8.1 Performance Orders in relation to breach**

In relation to any breach of this contract:

- (a) the Innocent Party shall be entitled to apply under Clause 13 for a Performance Order against the party in breach; and
- (b) if a Performance Order is made, the party against whom it has been made shall comply with it.

- 
- (iii) providing information to users, passengers and prospective passengers when there is disruption on the Heathrow Rail Infrastructure;
  - (iv) facilitating the effective exchange of information relating to the operation of trains on the Heathrow Rail Infrastructure and cooperating with access beneficiaries to provide such information;
  - (v) requiring a suitable timetabling process being put in place to ensure the capacity is fairly allocated, which then feeds into the information provided to passengers;
  - (vi) using reasonable endeavours to promptly resolve timetabling disputes and responding expeditiously to timetabling matters which an access beneficiary reasonably considers to be urgent;
  - (vii) procuring the provision to Network Rail of such information relating to train movements on the Heathrow Rail Infrastructure to allow Network Rail to publish a national timetable for passenger services; and
  - (viii) granting access to information relating to train movements on the Heathrow Rail Infrastructure to enquiry services.

<sup>39</sup> As HEOC is a subsidiary of HAL, TfL requires contractual assurance that no cross-subsidy will be made between the two entities.

<sup>40</sup> TfL requires transparency in the way HAL accounts for its infrastructure management activities and therefore assurance in relation to its track and station charging.

## **8.2 Compensation in relation to breach**

In relation to any breach of this contract, the party in breach shall indemnify the Innocent Party against all Relevant Losses.

## **9 NOT USED**

## **10 LIABILITY - OTHER MATTERS**

### **10.1 Train Operator indemnity**

The Train Operator shall indemnify HAL against all Relevant Losses resulting from:

- (a) a failure by the Train Operator to comply with its Safety Obligations;
- (b) any Environmental Damage arising directly from the acts or omissions of the Train Operator or the proper taking by HAL under Condition E2 of the HAL Network Code of any steps to prevent, mitigate or remedy an Environmental Condition which exists as a direct result of the acts or omissions of the Train Operator; and
- (c) any damage to the Network arising directly from the Train Operator's negligence.

### **10.2 HAL indemnity**

HAL shall indemnify the Train Operator against all Relevant Losses resulting from:

- (a) a failure by HAL to comply with its Safety Obligations;
- (b) a failure by HAL to comply with its asset stewardship obligations;<sup>41</sup>
- (c) any Environmental Damage arising directly from the acts or omissions of HAL<sup>42</sup>; and
- (d) any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this contract arising directly from HAL's negligence.

## **11 RESTRICTIONS ON CLAIMS**

### **11.1 Notification and mitigation**

A party wishing to claim under any indemnity provided for in this contract:

<sup>41</sup>

As discussed above in relation to Clause 6, HAL's licence exemption means that it is not otherwise subject to asset stewardship obligations and there is therefore no assurance that the Network will be properly and safely maintained. If HAL was subject to a network licence then the ORR would have recourse for breach of these conditions. TfL requires similar means of recourse and therefore proposes that HAL should be required to provide an indemnity in relation to failures to comply with the asset stewardship obligations proposed to be incorporated into this contract.

<sup>42</sup>

The reference to the British Railways Board is not relevant where Network Rail is not the infrastructure manager.

- (a) shall notify the other party of the relevant circumstances giving rise to that claim as soon as reasonably practicable after first becoming aware of those circumstances (and in any event within 365 days of first becoming so aware); and
- (b) subject to Clause 11.1(c), shall take all reasonable steps to prevent, mitigate and restrict the circumstances giving rise to that claim and any Relevant Losses connected with that claim; but
- (c) shall not be required to exercise any specific remedy available to it under this contract.

## **11.2 Restrictions on claims by HAL**

Any claim by HAL against the Train Operator for indemnity for Relevant Losses:

- (a) shall exclude payments to any person under or in accordance with the provisions of any Access Agreement other than any such payments which are for obligations to compensate for damage to property, and so that any claim for indemnity under this contract for such payments for damage to property, in relation to any incident, shall be limited to:
  - (i) the maximum amount for which the Train Operator would be liable for such damage in accordance with the Claims Allocation and Handling Agreement; less
  - (ii) any other compensation which the Train Operator has an obligation to pay for such damage;
- (b) shall exclude loss of revenue in respect of permission to use any part of the Network under or in accordance with any Access Agreement with any person; and
- (c) shall:
  - (i) include Relevant Losses only to the extent that these constitute amounts which HAL would not have incurred as network owner and operator but for the relevant breach; and
  - (ii) give credit for any savings to HAL which result or are likely to result from the incurring of such amounts.

## **11.3 Restrictions on claims by Train Operator**

Any claim by the Train Operator against HAL for indemnity for Relevant Losses:

- (a) shall exclude any Relevant Losses to the extent that they result from delays to or cancellations of trains [(other than delays or cancellations in

circumstances where the SPP Threshold has been exceeded as provided for in paragraph 18 of Schedule 8)]<sup>43</sup>; and

- (b) shall:
  - (i) include Relevant Losses only to the extent that these constitute amounts which the Train Operator would not have incurred as train operator but for the relevant breach; and
  - (ii) give credit for any savings to the Train Operator which result or are likely to result from the incurring of such amounts.

#### **11.4 Restriction on claims by both parties**

Any claim for indemnity for Relevant Losses shall exclude Relevant Losses which:

- (a) do not arise naturally from the breach; and
- (b) were not, or may not reasonably be supposed to have been, within the contemplation of the parties:
  - (i) at the time of the making of this contract; or
  - (ii) where the breach relates to a modification or amendment to this contract, at the time of the making of such modification or amendment,

as the probable result of the breach.

#### **11.5 Limitation on liability**

Schedule 9 shall have effect so as to limit the liability of the parties to one another under the indemnities in Clauses 8.2 and 10, but:

- (a) does not limit any liability arising under Schedules 4, 5, 7 or 8 or under the Traction Electricity Rules;
- (b) in relation to a failure to perform an obligation under the HAL Network Code, only to the extent (including as to time and conditions) that the HAL Network Code so provides; and
- (c) subject to Clause 18.3.3.

<sup>43</sup>

Please see the principles set out in Schedule 8. An equivalent concept of the SPP Threshold will be applicable in this context but this is subject to preparing the detail of the performance regime. The principle behind this proviso, i.e. that HAL should remain liable to the Train Operator for compensation for delays or cancellation after the applicable liquidated damages regime is no longer in effect, should remain. Once the performance / compensation regime has been finalised this clause will need to be updated accordingly.

## **11.6 Claims Allocation and Handling Agreement<sup>44</sup>**

### *11.6.1 General*

Clauses 16 and 17 of the Claims Allocation and Handling Agreement provide that claims between parties to it are limited to specified amounts unless the parties expressly contract otherwise.

### *11.6.2 Restriction of application*

Except as otherwise expressly provided in this contract, Clauses 16 and 17 of the Claims Allocation and Handling Agreement shall not apply as between the parties to this contract if and to the extent that the giving of any right or remedy as provided for under this contract would be prevented or restricted by Clauses 16 and 17 of the Claims Allocation and Handling Agreement.

### *11.6.3 Liability for small claims*

Nothing in this contract shall affect the application as between the parties of the provisions of the Claims Allocation and Handling Agreement which relate to liability for small claims equal to or below the Threshold (as defined in that agreement).

## **12 GOVERNING LAW**

This contract and any non-contractual obligations connected with it shall be governed by and construed in accordance with the laws of England and Wales.

## **13 DISPUTE RESOLUTION<sup>45</sup>**

### **13.1 ADRR**

A Relevant Dispute shall be referred for resolution in accordance with the Access Dispute Resolution Rules in force at the time of the reference (the “**ADRR**”), as modified by this Clause 13, unless:

<sup>44</sup>

HAL has advised TfL that it intends to accede to the industry standard CAHA (and will not be seeking to adopt an amended CAHA for the purposes of the Heathrow Rail Infrastructure). HAL has provided no further update on progress on becoming party to CAHA so Schedule 3 has been amended accordingly to reflect that both HAL and TfL / MTR will enter into an agreement whereby they agree to become a party to the industry standard CAHA. Further, HAL should be required to procure that all other users of the Network become party to the Claims Allocation and Handling Agreement and remain party to the Claims Allocation and Handling Agreement for the term of their access agreement with HAL.

<sup>45</sup>

HAL originally advised TfL that its intention was to become party to the access disputes resolution arrangements for the Network Rail network but that it is considering the mechanisms for doing so further. HAL then provided its latest version of the HAL Network Code to TfL on 10 March 2016 which included an amended version of the Network Rail ADRR, which indicates that HAL may be intending to create its own set of Access Dispute Resolution Rules..

- (a) any Part of the HAL Network Code or the Traction Electricity Rules provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply;
- (b) any Part of Schedules 4, 5, 7 or 8 provides for an alternative dispute resolution procedure for the Relevant Dispute, in which case such alternative procedure shall apply; or
- (c) Clause 13.2 applies.

## **13.2 Unpaid sums**

If either party fails to pay:

- (a) any invoice issued to it under this contract in respect of Track Charges; or
- (b) any other sum which has fallen due in accordance with any provision of this contract, then:
  - (i) the amount invoiced or sum due, as referred to in Clause 13.2(a) or (b), shall immediately constitute a debt due and owing from the party who has failed to pay the invoice or sum due to the other party (and to any assignee of a party's right to payment in respect of any invoice or other sum due);
  - (ii) such debt shall be recoverable by any means available under the laws of England and Wales; and
  - (iii) the dispute resolution procedures in Clauses 13.1 and 13.3 to 13.5 shall not apply to proceedings commenced under this Clause 13.2.

## **13.3 Performance Orders**

### *13.3.1 Power to order provisional relief*

For the purposes of section 39 of the Arbitration Act 1996, should any Relevant Dispute be allocated in accordance with the ADRR to arbitration under Chapter F of the ADRR, the arbitrator shall have power to order on a provisional basis any relief which he would have power to grant in a final award including Performance Orders.

### *13.3.2 Performance Orders*

A Performance Order:

- (a) is an order made under Clause 13.3.3(b), relating to a Relevant Dispute, whether by way of interim or final relief; and
- (b) may be applied for by HAL or the Train Operator in the circumstances set out in Clause 8.1, subject to the qualifications in Clause 17.8,

and an application for a Performance Order shall be without prejudice to any other remedy available to the claimant under this contract (whether final or interim and whether by way of appeal under the Network Code or otherwise).

### **13.3.3 Duties of arbitrator in relation to Performance Orders**

Without prejudice to any additional remedies that may be ordered by the arbitrator under Clause 13.4, where a dispute is allocated in accordance with the ADRR to arbitration and a party has applied for a Performance Order, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that:

- (a) the arbitrator shall decide as soon as possible whether the application is well founded or not; and
- (b) if the arbitrator decides that the application is well founded, he shall be required to make an interim or final declaration to that effect and, in that event, the arbitrator may also make any interim or final order directing any party to do or to refrain from doing anything arising from such declaration which he considers just and reasonable in all the circumstances.

### **13.4 Remedies**

The powers exercisable by the arbitrator as regards remedies shall include:

- (a) the powers specified in sections 48(3) to (5) of the Arbitration Act 1996;
- (b) the powers specified in the ADRR;
- (c) the power to make Performance Orders; and
- (d) the power to order within the same reference to arbitration any relief specified in Clause 13.4 (a), (b) and (c) consequent upon, or for the breach of, any interim or final Performance Order previously made.

### **13.5 Exclusion of applications on preliminary points of law**

Any recourse to any Court for the determination of a preliminary point of law arising in the course of the arbitration proceedings is excluded.

## **14 CONFIDENTIALITY**

### **14.1 Confidential Information**

#### **14.1.1 General obligation**

Except as permitted by Clause 14.2, all Confidential Information shall be held confidential during and after the continuance of this contract and shall not be divulged in any way to any third party without the prior written approval of the other party.

#### **14.1.2 HAL - Affiliates**

Except as permitted by Clause 14.2, HAL shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.



### 14.1.3 Train Operator - Affiliates

Except as permitted by Clause 14.2, the Train Operator shall procure that its Affiliates and its and their respective officers, employees and agents shall keep confidential and not disclose to any person any Confidential Information.

### 14.2 Entitlement to divulge<sup>46</sup>

Either party, and its Affiliates, and its and their respective officers, employees and agents, shall be entitled in good faith to divulge any Confidential Information without the approval of the other party in the following circumstances:

- (a) to ORR;
- (b) to the Secretary of State;
- (c) to Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network);<sup>47</sup>
- (d) to any Affiliate of either party (except, in the case of HAL, to any Affiliate that is a railway undertaking, including Heathrow Express Operating Company Limited)<sup>48</sup>;
- (e) to any officer or employee of the party in question or any person engaged in the provision of goods or services to or for him if disclosure is necessary or reasonably required to enable the party in question to perform its obligations under this contract, upon obtaining an undertaking of strict confidentiality from such officer, employee or person;
- (f) to any professional advisers or consultants of such party engaged by or on behalf of such party and acting in that capacity, upon obtaining an undertaking of strict confidentiality from such advisers or consultants;
- (g) to any insurer or insurance broker from whom such party is seeking insurance or in connection with the making of any claim under any policy of insurance upon obtaining an undertaking of strict confidentiality from the insurer or insurance broker;

<sup>46</sup> This clause should also be updated to allow disclosure pursuant to a Freedom of Information Act request, wherever relevant.

<sup>47</sup> Updated to refer to TfL/Rail for London Limited as the persons responsible for procuring passenger rail services on the Heathrow Rail Infrastructure. TfL appreciates that this is a different approach than was taken in the Track Access Contract entered into between Network Rail and MTR but considers this better future proofs the contract in the event that one day RfL is not the concessioning authority. Similar amendments have been made where appropriate throughout this contract.

<sup>48</sup> HAL should not be entitled to disclose confidential information of TfL/MTR to HEOC, who is a railway undertaking and a competing train operator on the Heathrow Rail Infrastructure. This clause has been updated accordingly.

- (h) to any lender, security trustee, bank or other institution from whom such party is seeking or obtaining finance or credit support for such finance, or any advisers to any such entity, or any rating agency from whom such party is seeking a rating in connection with such finance or credit support, upon obtaining an undertaking of strict confidentiality from the entity, advisers or rating agency in question;
- (i) to the extent required by the Act, the Railways (Licensing of Railway Undertakings) Regulations 2005, any other applicable law, the rules of any recognised stock exchange or regulatory body or any written request of any taxation authority;
- (j) to the extent that it has become available to the public other than as a result of a breach of confidence; and
- (k) under the order of any court or tribunal of competent jurisdiction (including the Allocation Chair or any relevant ADRR Forum, each as defined in the ADRR).

### **14.3 Return of Confidential Information**

Each of HAL and the Train Operator shall promptly return to the other party any Confidential Information requested by the other party if such request:

- (a) is made on or within two months after the Expiry Date or, if this contract is terminated earlier, is made within two months after the date on which this contract is terminated;
- (b) is reasonable; and
- (c) contains a sufficient description of the relevant Confidential Information to enable such information to be readily identified and located.

### **14.4 Retention or destruction of Confidential Information**

If HAL or the Train Operator, as the case may be, has not received a request to return any Confidential Information to the other party under and within the time limits specified in Clause 14.3, it may destroy or retain such Confidential Information.

### **14.5 Ownership of Confidential Information**

All Confidential Information shall be and shall remain the property of the party which supplied it to the other party.

### **14.6 Network Code, Schedule 7 and the Traction Electricity Rules**

Nothing in this Clause 14 restricts the right of HAL to disclose information to which this Clause 14 applies to the extent that it is permitted or required to do so under the Network Code, the Traction Electricity Rules or Schedule 7.

## **15 ASSIGNMENT, NOVATION AND SUBCONTRACTING**

### **15.1 Assignment**

Subject to the provisions of this Clause 15, neither party may assign, transfer, novate or create any encumbrance or other security interest over the whole or

any part of its rights and obligations under this contract except to the extent approved by ORR following consultation with the other party, and subject to the conditions (if any) of ORR's approval.

## **15.2 Novation**<sup>49</sup>

HAL (and any assignee of all or part of HAL's rights under this contract) shall:

- (a) agree to the novation of the rights and obligations of the Train Operator under this contract in favour of another person (including the Secretary of State, Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) or a person nominated by either of them) in any circumstances where:
  - (i) the Secretary of State requests HAL to participate in such a novation in the course of exercising its powers under section 30 of the Act; or
  - (ii) Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) requests HAL to participate in such a novation in the case of exercising its rights under the Concession Agreement; and
- (b) execute such contracts and do such things as the Secretary of State or Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) may reasonably request to give effect to the novation.

## **15.3 Novation terms**

Any novation under Clause 15.2 shall be on terms that:

- (a) the Train Operator shall not be released from:
  - (i) any accrued but unperformed obligation;
  - (ii) the consequences of any breach of this contract which is the subject of any proceedings (arbitral or otherwise) for the resolution of a dispute between the parties; or
  - (iii) any liability in respect of anything done under this contract before, or as at the date of, any such novation (except to the extent that such other person agrees to assume and be responsible for it); and
- (b) such other person shall not be required by HAL, as a term of or a condition to the novation, to agree to assume and be responsible for any unperformed obligation, liability or consequence of a breach of the kind referred to in Clause 15.3(a), but this shall not prevent any such

<sup>49</sup>

This clause has been updated to reflect that RfL has let the Concession Agreement and therefore will be interested in the operation of this agreement going forward.

agreement being a term or condition of the novation if required by the Secretary of State or Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network).

#### **15.4 Subcontracting<sup>50</sup>**

- (a) Subject to Clauses 15.4(b) and (c), HAL shall not, without first consulting with and obtaining the prior written consent of, the Train Operator, subcontract any of its obligations under this contract to any suitably qualified and competent third party (such consent not to be unreasonably withheld or delayed).
  - (b) HAL shall be entitled to subcontract the exercise of any of its rights and the performance of any of its obligations under this contract to Network Rail without the Train Operator's prior written consent provided that at all times during the continuation of such subcontract:
    - (i) Network Rail holds a licence granted under section 8 of the Act; and
    - (ii) Network Rail remains the infrastructure manager (for the purposes of both the Railways and Other Guided Transport Systems (Safety) Regulations 2006 and the Railways Infrastructure (Access and Management) Regulations 2005) for the substantial part of the wider Great Britain railway network (including in particular the Great Western Main Line).
- HAL shall promptly terminate any subcontract with Network Rail in respect of the exercise of any of its rights and/or the performance of any of its obligations under this contract if either of Clauses 15.4(b)(i) or 15.4(b)(ii) cease to be satisfied at any time during the term of this contract.
- (c) Nothing in this Clause 15.4 shall operate to relieve HAL of its obligations under this contract and HAL shall remain liable for the acts and omissions of any subcontractor as if they were the acts and omissions of HAL.

<sup>50</sup>

TfL recognises that HAL intendeds to subcontract the performance of its obligations and the exercise of its rights to Network Rail and accepts this (to the extent that Network Rail holds a network licence and is the principle infrastructure manager for the wider rail network). However, HAL must remain liable to TfL for Network Rail's acts and omissions. Accordingly, clause 15.4 has been inserted. Note that the drafting in clause 15.4(c) has been adapted from the equivalent drafting in the template station access agreement.

## **15A DISPOSITION OF THE NETWORK BY HAL<sup>51</sup>**

- (a) Promptly following execution of this contract, HAL shall procure that Land Registry places the following restriction in the Proprietorship Register of all the land comprising the Network and associated stations:

*["No disposition of the registered estate by the proprietor of the registered estate, or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a written consent signed by Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the track forming part of the registered estate) {address}."]*

- (b) The Train Operator shall (upon payment of its reasonable costs and expenses) use its reasonable endeavours to procure the consent of Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the track forming part of the registered estate) to any disposition affected by the restriction referred to in Clause 15A(a) and will provide to Land Registry sufficient evidence of such consent upon any disposition provided that the relevant disponent has previously entered into an agreement in a form approved by the Train Operator (such approval not to be unreasonably withheld or delayed) in which that disponent covenants with the Train Operator from the completion of that disposition to observe and perform the obligations of HAL under this contract as if that disponent were HAL.

## **16 PAYMENTS, INTEREST AND VAT**

### **16.1 Payment**

#### *16.1.1 No deduction*

All sums due or payable by either party under this contract shall be paid free and clear of any deduction, withholding or set off except only as may be required by law or as expressly provided in any Schedule to this contract, in the Network Code, or under the Traction Electricity Rules.

#### *16.1.2 Delivery of invoices*

All invoices issued under Schedule 7, or statements of amounts payable under Schedules 4, 5 or 8, under the Network Code, or under the Traction Electricity Rules, shall be delivered by hand at, or sent by prepaid first class

<sup>51</sup>

TfL is concerned in the absence of a licence obligation requiring the ORR's consent to the disposition of land, i.e. HAL could transfer the track / stations to a third party and render this contract redundant. This creates uncertainty for TfL and ultimately passengers who intend to use the Crossrail services to access Heathrow Airport. Accordingly, TfL proposes a solution to address this concern.

post<sup>52</sup> (with confirmation copy by prepaid first class post) to, the address for service for the recipient specified in Schedule 1 and shall be deemed to have been received by the addressee in accordance with Clause 18.4.3.

#### *16.1.3 Content of invoices and other statements of amounts payable*

Each invoice and statement of amounts payable shall contain such detail as to the constituent elements of the amounts stated to be payable as shall be necessary or expedient so as to enable the person to whom it is given to understand and check it.

#### *16.1.4 Method of payment*

All payments shall be made by direct debit mandate or standing order mandate, CHAPS transfer, BACS transfer or other electronic or telegraphic transfer to a London clearing bank or such other financial institution as may be approved by the party entitled to the payment, such approval not to be unreasonably withheld or delayed.

### **16.2 Interest**

Without prejudice to any other rights or remedies which one party may have in respect of the failure of the other party to pay any amount on the due date, amounts payable under this contract and not paid by the due date shall carry interest (to accrue daily and to be compounded monthly) at the Default Interest Rate from the due date until the date of actual payment (as well after judgment as before), except to the extent that late payment arises from any failure by the invoicing party to comply with Clause 16.1.2 or Clause 16.1.3.

### **16.3 VAT**

#### *16.3.1 Payment of VAT*

Where any taxable supply for VAT purposes is made under or in connection with this contract by one party to the other the payer shall, in addition to any payment required for that supply, pay such VAT as is chargeable in respect of it.

#### *16.3.2 Reimbursement of VAT*

Where under this contract one party is to reimburse or indemnify the other in respect of any payment made or cost incurred by the other, the first party shall also reimburse any VAT paid by the other which forms part of its payment made or cost incurred to the extent such VAT is not available for credit for the other party (or for any person with whom the indemnified party is treated as a member of a group for VAT purposes) under sections 25 and 26 of the Value Added Tax Act 1994.

<sup>52</sup> TFL does not accept delivery of invoice or notices by facsimile or email.

### 16.3.3 VAT credit note to be issued on repayment

Where under this contract any rebate or repayment of any amount is payable by one party to the other, and the first party is entitled as a matter of law or of HM Revenue and Customs practice to issue a valid VAT credit note, such rebate or repayment shall be paid together with an amount representing the VAT paid on that part of the consideration in respect of which the rebate or repayment is made, and the first party shall issue an appropriate VAT credit note to the other party.

## 16A INSURANCE

### 16A.1 Required Insurance Policies

HAL shall take out and maintain in full force and effect and at its own cost, insurance of no less than £155 million in respect of all liabilities and in accordance with the ORR's guidance on insurance requirements, from time to time.<sup>53</sup>

### 16A.2 Evidence of Insurance Policies<sup>54</sup>

Promptly following any request by the Train Operator, and otherwise on each anniversary of the execution of this contract, HAL shall provide to the Train Operator for inspection evidence satisfactory to the Train Operator that the insurance policies specified in Clause 16A.1 are in place, are in full force and effect and that all premiums payable in respect of such insurance policies have been paid in full.

## 17 FORCE MAJEURE EVENTS

### 17.1 Meaning of Force Majeure Event

In this Clause 17:

**“Affected Party”** means, in relation to a Force Majeure Event, the party claiming relief under this Clause 17 by virtue of that Force Majeure Event, and **“Non-affected Party”** shall be construed accordingly;

**“Force Majeure Event”** means any of the following events (and any circumstance arising as a direct consequence of any of the following events):

<sup>53</sup>

In the absence of a licence obligation, the contract should specify particular levels and types of insurance to be held by HAL in providing the various track services. These insurance policies need to reflect the standard industry requirements for network licence holders; we note that the insurance requirements in Network Rail's network licence require it to, in respect of licensed activities, maintain insurance against third party liabilities in accordance with any relevant ORR consent (i.e. on terms approved by the ORR, as set out in its guidance). We consider this guidance should also be followed by HAL given the passenger services operating on the Heathrow Rail Infrastructure.

<sup>54</sup>

TfL requires ongoing assurance that the required insurances are being maintained by HAL.

- (a) an act of the public enemy or terrorists or war (declared or undeclared), threat of war, revolution, riot, insurrection, civil commotion, demonstration or sabotage;
- (b) acts of vandalism or accidental damage or destruction of machinery, equipment, track or other infrastructure;
- (c) natural disasters or phenomena, including extreme weather or environmental conditions (such as lightning, earthquake, hurricane, storm, fire, flood, drought or accumulation of snow or ice);
- (d) nuclear, chemical or biological contamination;
- (e) pressure waves caused by devices travelling at supersonic speeds;
- (f) discovery of fossils, antiquities or unexploded bombs; and
- (g) strike or other industrial action which is a single circumstance and which also is a strike or industrial action in sectors of the economy other than the railway industry;

**“Force Majeure Notice”** means a notice to be given by the Affected Party to the other party stating that a Force Majeure Event has occurred;

**“Force Majeure Report”** means a report to be given by the Affected Party to the other party following the giving of a Force Majeure Notice;

**“Relevant Force Majeure Event”** means a Force Majeure Event in relation to which an Affected Party is claiming relief under this Clause 17; and

**“Relevant Obligation”** means an obligation under this contract in respect of which a Force Majeure Event has occurred and the Affected Party has claimed relief under this Clause 17.

## **17.2 Nature and extent of relief for Force Majeure**

Force Majeure relief under this Clause 17:

- (a) extinguishes the obligation of the Affected Party to indemnify the other party under Clause 8.2 in respect of Relevant Losses sustained as a result of the failure of the Affected Party to perform a Relevant Obligation; but
- (b) is not available in respect of:
  - (i) any obligation to pay money under Schedules 4, 5, 7 and 8 or the Traction Electricity Rules; or
  - (ii) any other obligation to do or refrain from doing any other thing provided for in this contract; and
- (c) is only available in relation to a failure to perform an obligation under the Network Code to the extent (including as to time and conditions) that the Network Code so provides.

## **17.3 Entitlement to Force Majeure relief**

An Affected Party is entitled to Force Majeure relief if and to the extent that:



- (a) performance of the Relevant Obligation has been prevented or materially impeded by reason of a Force Majeure Event;
- (b) it has taken all reasonable steps, taking account of all relevant circumstances (including as to whether the event in question could reasonably have been anticipated):
  - (i) to avoid the occurrence of the Force Majeure Event; and
  - (ii) to minimise, and where practicable avoid, the effects of the Force Majeure Event on its ability to perform the Relevant Obligation; and
- (c) except in the case of Clause 17.1(f), none of the Affected Party, its officers, employees or agents caused the Force Majeure Event.

#### **17.4 Procedure for claiming relief**

Without prejudice to Clause 17.3, an Affected Party is only entitled to claim Force Majeure relief under this Clause 17 if it complies with the obligations to give Force Majeure Notices, Force Majeure Reports and provide other information under Clause 17.5 and to perform its obligations under Clause 17.6.

#### **17.5 Force Majeure Notices and Reports**

##### *17.5.1 Force Majeure Notice*

In relation to any Relevant Force Majeure Event:

- (a) as soon as reasonably practicable after the Affected Party becomes aware, or ought reasonably to have become aware, that such Force Majeure Event qualifies for relief under this Clause 17 (and, in any event, within 72 hours of becoming aware of such circumstances), the Affected Party shall give a Force Majeure Notice; and
- (b) the Force Majeure Notice shall include detailed particulars (to the extent available) of the Relevant Force Majeure Event and its consequences, its effects on the Affected Party, the Relevant Obligations, the likely duration of such consequences and effects and the remedial measures proposed by the Affected Party to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects.

##### *17.5.2 Force Majeure Report*

Following the giving of a Force Majeure Notice:

- (a) the Affected Party shall give a Force Majeure Report as soon as practicable, and in any event within seven days of service of the Force Majeure Notice; and
- (b) the Force Majeure Report shall constitute a full report on the Relevant Force Majeure Event, amplifying the information provided in the Force Majeure Notice and containing such information as may reasonably be required by the Non-affected Party, including the effect which the

Relevant Force Majeure Event is estimated to have on the Affected Party's performance of the Relevant Obligations.

#### *17.5.3 Other information*

The Affected Party shall promptly give the Non-affected Party all other information concerning the Relevant Force Majeure Event and the steps which could reasonably be taken, and which the Affected Party proposes to take, to avoid or remove the Relevant Force Majeure Event or to mitigate its consequences and effects as may reasonably be requested by the Non-affected Party from time to time.

#### **17.6 Mitigation**

The Affected Party shall, promptly upon becoming aware of the occurrence of a Force Majeure Event in respect of which it intends to claim relief, use all reasonable endeavours to:

- (a) minimise the effects of such Force Majeure Event on the performance of the Relevant Obligations; and
- (b) minimise the duration of such Force Majeure Event,

and shall keep the Non-affected Party fully informed of the actions which it has taken or proposes to take under this Clause 17.6.

#### **17.7 Duration of relief for force majeure**

The right of an Affected Party to relief under Clause 17.2 shall cease on the earlier of:

- (a) the date on which its performance of the Relevant Obligations is no longer prevented or materially impeded by the Relevant Force Majeure Event; and
- (b) the date on which such performance would no longer have been prevented or materially impeded if the Affected Party had complied with its obligations under Clause 17.6.

#### **17.8 Availability of Performance Order**

If and to the extent that a breach of this contract has been caused by a Relevant Force Majeure Event, the Non-affected Party shall not be entitled to a Performance Order except to secure performance by the Affected Party of its obligations under this Clause 17.

### **18 MISCELLANEOUS**

#### **18.1 Non waiver**

##### *18.1.1 No waiver*

No waiver by either party of any failure by the other to perform any obligation under this contract shall operate or be construed as a waiver of any other or further default, whether of a like or different character.

### *18.1.2 Failure or delay in exercising a right or remedy*

The failure to exercise or delay in exercising a right or remedy under this contract shall not constitute a waiver of the right or remedy or a waiver of any other rights or remedies, and no single or partial exercise of any right or remedy under this contract shall prevent any further exercise of the right or remedy or the exercise of any other right or remedy.

## **18.2 Variations**

### *18.2.1 Amendments to be in writing and to be approved*

No amendment of any provision of this contract shall be effective unless:

- (a) such amendment is in writing and signed by, or on behalf of, the parties; and
- (b) if it is an amendment which requires ORR's approval under section 22 of the Act, the amendment has been approved by ORR.

### *18.2.2 Exceptions*

Clause 18.2.1(b) does not apply to amendments of the following kinds:

- (a) an amendment made by virtue of a general approval issued by ORR under section 22 of the Act; and
- (b) a modification made by virtue of Clause 18.4.2.

### *18.2.3 No Office of Rail and Road approval needed*

Modifications of the following kinds do not require ORR's approval under section 22 of the Act and so are not subject to Clause 18.2.1(b):

- (a) modifications effected by virtue of any of the Schedules to this contract; and
- (b) modifications effected by virtue of the Network Code or the Traction Electricity Rules,

unless the relevant provision expressly states that it requires the approval of ORR.

### *18.2.4 Conformed copy of contract*

HAL shall produce and send to the Train Operator and to ORR a conformed copy of this contract within 28 days of the making of any amendment or modification to it (including any modification made by virtue of Schedule 10).

## **18.3 Entire contract and exclusive remedies**

### *18.3.1 Entire contract*

Subject to Clause 18.3.3:

- (a) this contract contains the entire agreement between the parties in relation to the subject matter of this contract;

- (b) each party acknowledges that it has not been induced to enter into this contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in this contract and, to the extent that this is not the case, the relevant party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation to any such matter; and
- (c) neither party shall have any right to rescind or terminate this contract either for breach of contract or for misrepresentation or otherwise, except as expressly provided for in this contract.

#### **18.3.2 Exclusive remedies**

Subject to Clause 18.3.3 and except as expressly provided in this contract:

- (a) neither party shall have any liability (including liability arising as a result of any negligence, breach of contract or breach of statutory obligation) to the other in connection with the subject matter of this contract; and
- (b) the remedies provided for in this contract shall be the sole remedies available to the parties in respect of any matters for which such remedies are available.

#### **18.3.3 Fraud, death and personal injury**

Without prejudice to the generality of this Clause 18.3, nothing in this contract shall exclude, restrict or limit, or purport to exclude, restrict or limit:

- (a) any liability which either party would otherwise have to the other party, or any right which either party may have to rescind this contract, in respect of any statement made fraudulently by the other party before the execution of this contract;
- (b) any right which either party may have in respect of fraudulent concealment by the other party;
- (c) any right which either party may have in respect of a statement of the kind referred to in section 146 of the Act, whether or not proceedings have been instituted in that respect; or
- (d) any liability which either party may have towards the other party for death or personal injury resulting from its negligence or the negligence of any of its officers, employees or agents.

### **18.4 Notices**

#### **18.4.1 Giving of notices**

Any notice to be given under this contract:

- (a) shall be in writing; and
- (b) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by

sending it by prepaid first class post, recorded delivery to the relevant address set out in Schedule 1.

For the purposes of this Clause 18.4 and Clause 16.1.2, delivery by hand shall include delivery by a reputable firm of couriers.

#### **18.4.2 Right to modify registered company and communication details**

A party shall be entitled to modify in any respect:

- (a) the registered name and address details which relate to it and are set out on page one of this contract (provided that this modification shall not amount to or purport to be an assignment, transfer or novation of this contract); and
- (b) the communication particulars which relate to it and which are set out in Schedule 1,

by giving notice of such modification:

- (i) to the other party as soon as reasonably practicable; and
- (ii) to ORR within 14 days of such modification.

#### **18.4.3 Deemed receipt**

A notice shall be deemed to have been given and received:

- (a) if sent by hand or recorded delivery, at the time of delivery; and
- (b) if sent by prepaid first class post from and to any place within the United Kingdom, three Working Days after posting unless otherwise proven.<sup>55</sup>

#### **18.4.4 Copyees**

If Schedule 1 specifies any person to whom copies of notices shall also be sent:

- (a) the party giving a notice in the manner required by this Clause 18.4 shall send a copy of the notice to such person at the address for sending copies as specified in Schedule 1, or to such other person or address as may, from time to time, have been notified by the party to be notified to the notifying party under this Clause 18.4; and
- (b) such copy notice shall be sent immediately after the original notice.

### **18.5 Counterparts**

This contract may be executed in two counterparts which, taken together, shall constitute one and the same document. Either party may enter into this contract by signing either of such counterparts.

<sup>55</sup>

Please see our comments on Clause 16.1.2 above.

## **18.6 Survival**

Those provisions of this contract which by their nature or implication are required to survive expiry or termination of this contract (including the provisions of Clauses 8 (Liability), 10 (Liability - Other Matters), 11 (Restrictions on Claims); 12 (Governing Law), 13.2 (Unpaid Sums), 14 (Confidentiality), 16 (Payments, Interest and VAT), 17 (Force Majeure Events), paragraph 4 of Schedule 6 (Consequence of Termination) and Schedule 9 (Limitation on liability)), shall so survive and continue in full force and effect, together with any other provisions of this contract necessary to give effect to such provisions.

## **18.7 Contracts (Rights of Third Parties) Act 1999**

### *18.7.1 Application to third parties*

Save as provided in this Clause 18.7 or as expressly provided elsewhere in this contract, no person who is not a party to this contract shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this contract.

### *18.7.2 Application to the Office of Rail and Road*

ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under this contract.

### *18.7.3 Application to the Secretary of State or Transport for London*

The Secretary of State or Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce Clauses 15.2 and 15.3.

### *18.7.4 Application of the Traction Electricity Rules to other train operators*

Any Metered Train Operator, Prospective Metered Train Operator or Modelled Train Operator (as defined in the Traction Electricity Rules) shall have the right under the Contracts (Rights of Third Parties) Act 1999 directly to enforce such rights as have been granted to it under the Traction Electricity Rules.

## **19 NOT USED<sup>56</sup>**

<sup>56</sup>

Transition arrangements are not required given that these are new arrangements for the use of the Heathrow Rail Infrastructure.



## **SCHEDULE 2: THE NETWORK<sup>58</sup>**

1. NOT USED
2. NOT USED
3. In order to make Ancillary Movements, the Train Operator has permission to use any reasonable route on the Network, subject to obtaining any necessary route clearance for the Specified Equipment over the route in question.
4. In order to Stable railway vehicles, the Train Operator has permission to use any reasonable location on the Network, subject to obtaining any necessary route clearance for the Specified Equipment for the location in question.
5. Use of all routes is subject to the HAL Network Code.

<sup>58</sup> Paragraphs 1 and 2 are not required given the definition of Routes is not applicable to this contract (i.e. because access to the whole Network is required). Paragraphs 3 to 5 are still relevant and have been retained with minor amendments.



### **SCHEDULE 3: COLLATERAL AGREEMENTS**

1. An access agreement between (1) the Train Operator and (2) HAL granting the Train Operator permission to use the Central Terminal Areas station.<sup>59</sup>
2. An access agreement between (1) the Train Operator and (2) HAL granting the Train Operator permission to use Terminal 4 station.<sup>60</sup>
3. An agreement under which HAL and the Train Operator agree to become a party to the Claims Allocation and Handling Agreement and, for the purpose of Schedule 6, the Claims Allocation and Handling Agreement.<sup>61</sup>
4. A concession agreement between (1) the Train Operator and (2) Rail for London Limited under which the concessionaire undertakes to provide or procure the provision of all or a material part of the Services.<sup>62</sup>
5. An accession agreement to the document entitled Emergency Access Code as approved or directed by ORR and, for the purpose of Schedule 6, the Emergency Access Code.<sup>63</sup>

<sup>59</sup> Updated to reflect stations owned by HAL to which TfL / MTR is seeking access under the station access agreements.

<sup>60</sup> As above.

<sup>61</sup> Updated to reflect that both HAL and MTR will need to accede to the industry standard CAHA. See also footnote relating to Clause 11.6.

<sup>62</sup> As a TfL concessionaire will be a beneficiary of this contract (and TfL will be funding the Crossrail services), this clause has been updated to reflect TfL's role as concessioning authority.

<sup>63</sup> HAL has advised TfL that it will not be preparing a separate Emergency Access Code for the Network. Given the Heathrow Rail Infrastructure is operated by and its operation is aligned with the Network Rail Network, TfL considers that accession to the Emergency Access Code applicable to Network Rail Network remains necessary.

## **SCHEDULE 4: ENGINEERING ACCESS STATEMENT, TIMETABLE PLANNING RULES AND RESTRICTIONS OF USE<sup>64</sup>**

### **PART 1: NOT USED**

### **PART 2: NOT USED**

### **PART 3: NOT USED**

TfL requires compensation in the event that it is restricted by HAL from accessing the Network in the period during which it has been granted access (for example due to maintenance work). HAL has advised TfL that it is confident no such disruptions would occur as it only intends to undertake engineering work in so-called “white periods” (i.e. non-service periods). However, if such disruption was to occur, TfL would nevertheless expect to be compensated. HAL proposed that any such compensation could be dealt with under Schedule 8, which TfL has accepted. Therefore, TfL proposes the following compensation regime; this would be incorporated into Schedule 8 and Schedule 4 would be marked as Not Used.

- The Engineering Access Statement is to specify the ‘white period’ for access to the Network.
- Any changes to the ‘white period’ must be made in accordance with the regime set out in the HAL Network Code.
- Compensation will be payable to the Train Operator by HAL in the event of any restriction on the Train Operator’s use of the Network outside of the ‘white period’.

64

As noted in relation to Part 3 of Schedule 4, HAL has indicated that it does not propose including an equivalent of Schedule 4 in this contract, instead relying upon the performance regime set out in Schedule 8 to compensate the Train Operator wherever there are planned / unplanned restrictions of use. For the purposes of this regulation 29/30 application, TfL has accepted this approach and sets out principles in Schedule 8 as to how this should be addressed (including which timetable is considered when assessing whether there is a restriction of use and which trains will be cancelled as a result). However, TfL recognises the practical difficulties that this may create (as a result of HAL’s proposal), particularly given Network Rail is proposed to be HAL’s subcontractor for the purposes of the operation of the track comprised in the Heathrow Rail Infrastructure (and therefore would have to administer a fundamentally different “restrictions of use” regime from that used on the Great Western Main Line).

- Compensation will be calculated (parri passu) in accordance with the regime set out in Schedule 8 for operational disruption (i.e. with no amendments).

**PART 4: NOT USED**

**PART 5: NOT USED**

## SCHEDULE 5: THE SERVICES AND THE SPECIFIED EQUIPMENT

### 1 Definitions

1.1 In this Schedule unless the context otherwise requires:

<b>“Calling Pattern”</b>	means a list of stations related to one or more Passenger Train Slots, at which stops are to be Scheduled in the Working Timetable;
<b>“Contingent Right”</b>	means a right under this Schedule 5 which is not a Firm Right and which is subject to the fulfilment of all competing Exercised Firm Rights and any additional contingency specified in this Schedule 5;
<b>“Day”</b>	means any period of 24 hours beginning at 0200 hours and ending immediately before the next succeeding 0200 hours, and any reference in this Schedule to any named day of the week shall be to such period commencing on that named day;
<b>“Exercised”</b>	has the meaning ascribed to it in Part D of the HAL Network Code;
<b>“Firm Right”</b>	has the meaning ascribed to it in Part D of the HAL Network Code;
<b>“Journey Time”</b>	means the time in the Working Timetable to be taken by a Service in travelling between the specified departure point and specified destination for that Service;
<b>“Journey Time Review Notice”</b>	has the meaning ascribed to it in paragraph 7.4;
<b>“Maximum Journey Time” or “MJT”</b>	means, in respect of a Passenger Train Slot, the corresponding Journey Time set out in column 3 of Table 6.1;
<b>“Modification Notice”</b>	has the meaning ascribed to it in paragraph 7.9;
<b>“Network Change”</b>	has the meaning ascribed to it in Part G of the HAL Network Code;
<b>“Off-Peak Services”</b>	means Services Scheduled on any part of a Weekday which are not “Peak Services”, and “Off-Peak” shall be construed accordingly;
<b>“Passenger Train Slot”</b>	means a Train Slot intended by the Train Operator to be used for the provision of a Service;

<b>“Peak Services”</b>	means Services Scheduled on any Weekday (excluding Public Holidays) (i) to arrive at Heathrow Terminal 4 Station between 0605 and 0904 hours and 1633 and 1932 hours or (ii) to depart from Heathrow Terminal 4 Station between 0628 and 0927 hours and 1528 and 1827 hours, and “Peak” shall be construed accordingly;
<b>“Public Holiday”</b>	means any day other than Saturday or Sunday on which the banks in the City of London are not open for business;
<b>“Reduced Regular Calling Pattern”</b>	has the meaning ascribed to it in paragraph 4.1;
<b>“Regular Calling Pattern”</b>	has the meaning ascribed to it in paragraph 4.1;
<b>“Scheduled”</b>	means, in relation to the quantum, timing or any other characteristic of a train movement, that quantum, timing or other characteristic as included in the applicable Working Timetable;
<b>“Service Group”</b>	means any one or more (as the context may require) of the service groups described in this Schedule;
<b>“Timetable Period”</b>	means the period of time between (and including) one Timetable Change Date and (but excluding) the immediately succeeding Timetable Change Date;
<b>“Timing Load”</b>	means, in relation to a Service, the timing reference code as defined from time to time in the Working Timetable;
<b>“Train Service Code” or “TSC”</b>	means the eight character code applied in the Performance Monitoring System and used to identify Services;
<b>“Weekday”</b>	means any day (including, except for the purposes of paragraphs 6 and 7, a Public Holiday) which is not a Saturday or Sunday; and
<b>“xx20”</b>	means, as an example of this notation, 20 minutes past the hour.

- 1.2 Unless otherwise stated, where in this Schedule a period is expressed to be between two specific times that period shall be inclusive of both such times.
- 1.3 The Train Operator's rights under this Schedule as to numbers of Passenger Train Slots per Day are calculated by reference to departures from the Scheduled start point on the Day in question, notwithstanding that a Passenger Train Slot may not be Scheduled to arrive at its end point until the immediately succeeding Day.

## 2 Passenger Train Slots

Table 2.1: Passenger Train Slots

1						2					
Service Group - [To be confirmed] <sup>65</sup>											
Service description						Passenger Train Slots					
From	To	Via	Description	TSC <sup>66</sup>	Timing Load	Peak times <sup>1</sup>		Off-Peak times <sup>2</sup>	Weekday	Saturday <sup>3</sup>	Sunday <sup>4</sup>
						Morning Peak	Evening Peak				
Heathrow Tunnel Junction	Heathrow Terminal 4 Station	N/A	All Stations	[To be confirmed]	345	12	12	52	76	76	75
Heathrow Terminal 4 Station	Heathrow Tunnel Junction	N/A	All Stations	[To be confirmed]	345	12	12	52	76	76	75

### Notes to Table:

1 Peak times – arriving at Heathrow Terminal 4 Station between 0605 and 0904 hours and 1633 and 1932 hours and departing from Heathrow Terminal 4 Station between 0628 and 0927 hours and 1528 and 1827 hours.

2 Off-Peak times - arriving at and departing from Heathrow Terminal 4 Station outside Peak times.

3 “Saturday” means in Table 2.1 the period of 24 hours beginning at 0200 hours on Saturday and ending immediately before the next succeeding 0200 hours.

<sup>65</sup> The Service Group description for each applicable Table in this Schedule 5 should be inserted once confirmed. The Service Groups is not in dispute for the purposes of this regulation 29/30 application as they will be determined in due course.

<sup>66</sup> The Train Service Codes for each applicable Table in this Schedule 5 should be inserted once confirmed. As with the Service Group descriptions, these are not in dispute for the purposes of this regulation 29/30 application as they will be determined in due course.

4 “Sunday” means in Table 2.1 the period of 24 hours beginning at 0200 hours on Sunday and ending immediately before the next succeeding 0200 hours.

*Table 2.1A: Passenger Train Slots on Boxing Day*

1					2
Service Group - [To be confirmed] <sup>67</sup>					
Service description – Boxing Day					Passenger Train Slots
From	To	Via	Description	TSC <sup>68</sup>	Boxing Day
Heathrow Tunnel Junction	Heathrow Terminal 4 Station	N/A	All stations	[To be confirmed]	63
Heathrow Terminal 4 Station	Heathrow Tunnel Junction	N/A	All stations	[To be confirmed]	63

<sup>67</sup> Please see footnote 65 above.

<sup>68</sup> Please see footnote 66 above.

### *Passenger Train Slots*

- 2.1 The Train Operator has Firm Rights to the number of Passenger Train Slots in the Working Timetable in respect of a Service Group as listed against each Service:
  - (a) specified in Table 2.1 on the Days and within the Peak and Off-Peak times so listed; and
  - (b) specified in Table 2.1A on the Day so listed,using any Specified Equipment included in paragraph 5.1.(a) that is capable of achieving the Timing Load shown. If the Train Operator makes an Access Proposal, or relies on a Rolled Over Access Proposal, to operate any of the Services specified in Table 2.1 or Table 2.1A using Specified Equipment that is not capable of achieving the Timing Load shown, then the rights subject to the Access Proposal or Rolled Over Access Proposal (as applicable) will be treated as Contingent Rights for the purposes of Part D of the HAL Network Code.
- 2.2 In order to provide for the Scheduling of part only of Passenger Train Slots specified in Table 2.1 the Train Operator has Contingent Rights for such a Passenger Train Slot to commence from and/or terminate at Central Terminals Area Station.
- 2.3 In order to provide through Services the Train Operator has Contingent Rights to combine Passenger Train Slots at Central Terminals Area Station.



Table 2.2: Additional Passenger Train Slots

<b>1</b>					<b>2</b>		
<b>Service Group - [To be confirmed]</b> <sup>69</sup>							
<b>Service description – Driver Training</b> <sup>70</sup>					<b>Additional Passenger Train Slots</b>		
<b>From</b>	<b>To</b>	<b>Via</b>	<b>Description</b>	<b>TSC</b> <sup>71</sup>	<b>Weekday</b>	<b>Saturday</b>	<b>Sunday</b>
Heathrow Tunnel Junction	Heathrow Terminal 4 Station	N/A	All stations	[To be confirmed]	5	5	5
Heathrow Terminal 4 Station	Heathrow Tunnel Junction	N/A	All stations	[To be confirmed]	5	5	5

<sup>69</sup> Please see footnote 65 above.

<sup>70</sup> Driver training rights are expected to be required from December 2017. As noted in the covering letter to this regulation 29/30 application, at this stage TfL is primarily seeking rights for the passenger services from May 2018, with a limited number of driver training rights from December 2017. However, further rights may be required once the driver training requirement is known and to facilitate the trial running and trial operations. Furthermore, Bombardier Transportation is likely to require access rights for testing and mileage accumulation purposes. TfL notes that driver training rights will not be required indefinitely. The driver training programme remains to be confirmed (including start and end dates). As the rights required become more certain, amended rights are likely to be sought.

<sup>71</sup> Please see footnote 66 above.

### *Additional Passenger Train Slots*

- 2.4 The Train Operator has Contingent Rights to additional Passenger Train Slots in the Working Timetable in respect of a Service Group up to the number listed against each Service specified in Table 2.2 and on the Days so listed.
- 2.5 A Contingent Right for an additional Passenger Train Slot under paragraph 2.4 includes:
- (a) a Contingent right to call at any station listed in Table 4.1;
  - (b) a Contingent Right to have Scheduled part only of the Passenger Train Slot in question; and
  - (c) a Contingent Right to combine Passenger Train Slots to provide a through Service.

### *Ancillary Movements*

- 2.6 The Train Operator has Firm Rights to make Ancillary Movements of Specified Equipment to the extent necessary or reasonably required to give full effect to the other Firm Rights of the Train Operator, including:
- (a) movements for the purpose of maintenance of rolling stock to and from maintenance depots;
  - (b) movements for driver training purposes; and
  - (c) empty stock movements.
- 2.7 For the purpose of paragraph 2.6, Ancillary Movements shall not include movements of rolling stock for the purpose of testing or driver training to the extent that:
- (a) the rolling stock concerned has not achieved vehicle and route acceptance necessary for its use in the carriage of passengers on the route in question; or
  - (b) where the route in question is not used by the Train Operator for carriage of passengers, the rolling stock concerned has not achieved vehicle and route acceptance necessary to operate on the route without passengers on board.

### *Relief Passenger Train Slots*

- 2.8 The Train Operator has Contingent Rights to relief Passenger Train Slots for special or seasonal events, whenever the Train Operator believes (acting in a reasonable and proper manner) that a relief Passenger Train Slot is necessary to accommodate anticipated customer demand. These Contingent Rights are subject to:
- (a) the relief Passenger Train Slot being additional to a Service for which the Train Operator has access rights in Table 2.1, Table 2.1A or Table 2.2; and

- (b) [each relief Passenger Train Slot being allocated the relevant Train Service Code as shown in Schedule 7, Appendix 7C.]<sup>72</sup>

2.9 NOT USED

2.10 The Train Operator has the following Firm Rights in the Working Timetable in respect of a Service Group as listed against each Service in respect of Public Holidays:

- (a) on Christmas Day, no Firm Rights to any Passenger Train Slots;
- (b) on Boxing Day, Firm Rights to the number of Passenger Train Slots set out in Table 2.1A;
- (c) on any Public Holiday falling between Christmas Day (exclusive) and New Year's Day (inclusive) (other than Boxing Day), Firm Rights to the number of Passenger Train Slots set out in Table 2.1 for the equivalent Day upon which such Public Holiday falls; and
- (d) on Public Holidays other than those within paragraphs (a) to (c) above, Firm Rights to the number of Passenger Train Slots set out in Table 2.1 for Saturdays.

2.11 The exercise of a Stabling right shall not count against the number of Passenger Train Slots listed in Table 2.1 or Table 2.1A.

<sup>72</sup> To be confirmed once the detail of Schedule 7 has been prepared.

### 3 Intervals

Table 3.1: Service Intervals

1					2	3				4			
Service Group - [To be confirmed] <sup>73</sup>													
Service description					Station where interval applies	Interval (minutes)				Maximum variation (+/- minutes)			
From	To	Via	Description	TSC <sup>74</sup>		Peak <sup>1</sup>	Off-Peak <sup>2</sup>	Satur-day <sup>3</sup>	Sun-day <sup>4</sup>	Peak <sup>1</sup>	Off-Peak <sup>2</sup>	Satur-day <sup>3</sup>	Sun-day <sup>4</sup>
Heathrow Tunnel Junction	Heathrow Terminal 4 Station	N/A	All stations	[To be confirmed]	Heathrow Terminal 4 Station	15	15	15	15	+/-1	+/-1	+/-1	+/-1
Heathrow Terminal 4 Station	Heathrow Tunnel Junction	N/A	All stations	[To be confirmed]	Heathrow Terminal 4 Station	15	15	15	15	+/-1	+/-1	+/-1	+/-1

Notes to Table:

1 “Peak” means in Table 3.1 arriving at Heathrow Terminal 4 Station between 0605 and 0904 hours and 1633 and 1932 hours and departing from Heathrow Terminal 4 Station between 0628 and 0927 hours and 1528 and 1827 hours.

2 “Off-Peak” means in Table 3.1 arriving at and departing from Heathrow Terminal 4 Station outside Peak times.

3 “Saturday” means in Table 3.1 the period of 24 hours beginning at 0200 hours on Saturday and ending immediately before the next succeeding 0200 hours.

4 “Sunday” means in Table 3.1 the period of 24 hours beginning at 0200 hours on Sunday and ending immediately before the next succeeding 0200 hours.

<sup>73</sup> Please see footnote 65 above.

<sup>74</sup> Please see footnote 66 above.

### *Service Intervals*

- 3.1 NOT USED
- 3.2 In respect of each Service specified in column 1 of Table 3.1 and subject to paragraphs 3.3 and 3.4, the Train Operator has Firm Rights to the interval between Passenger Train Slots shown in column 3 of Table 3.1 from the station shown in column 2 of that Table, being a station of origin or an intermediate station.
- 3.3 The Firm Rights specified in paragraph 3.2 may only be Exercised if the Access Proposal or Rolled Over Access Proposal for each such Service complies with the Regular Calling Pattern or Reduced Regular Calling Pattern and the Specified Equipment is capable of achieving the Timing Load specified for each such Service.
- 3.4 HAL shall be entitled to vary any one or more departures from the station named in column 2 of Table 3.1 by up to the number of minutes specified in column 4 of Table 3.1, with the effect that the interval between any two or more of such Passenger Train Slots may be less than or more than that specified in column 3 of Table 3.1, provided that the cumulative effect of such flexing over a period of 60 minutes shall not reduce the Train Operator's entitlement to its full quantum of Passenger Train Slots

## 4 Calling Patterns

Table 4.1: Calling Patterns

1					2	3
Service Group - [To be confirmed] <sup>75</sup>						
Service description						
Between	And	Via	Description	TSC <sup>76</sup>	Regular Calling Pattern	Additional stations
Heathrow Tunnel Junction	Heathrow Terminal 4 station	N/A	All stations	[To be confirmed]	Central Terminals Area Station, Heathrow Terminal 4 Station	Heathrow Terminal 5 Station <sup>77</sup>

<sup>75</sup> Please see footnote 65 above.

<sup>76</sup> Please see footnote 66 above.

<sup>77</sup> Trains may need to call at Heathrow Terminal 5 Station in the event of an emergency, engineering works, unplanned disruptions or other unforeseen circumstances. TfL therefore requires Contingent Rights in respect of this station.

### *Calling Patterns*

- 4.1 In respect of each Service specified in column 1 of Table 4.1, the Train Operator has Firm Rights to the corresponding Calling Pattern listed in column 2 of that Table (the “**Regular Calling Pattern**”) or any subset of the Calling Pattern (the “**Reduced Regular Calling Pattern**”).

### *Additional calls*

- 4.2 The Train Operator has Contingent Rights to have Scheduled, in respect of any Passenger Train Slot, calls at one or more of the stations set out opposite the Service in column 3 of Table 4.1 being stations which do not form part of the Regular Calling Pattern.

## 5 Specified Equipment

### *Specified Equipment*

5.1 In order to provide the Services specified in this Schedule 5, subject to obtaining any necessary route clearance for the route in question, the Train Operator has:

(a) Firm Rights to operate the following railway vehicles:

Class 345
-----------

and

(b) Contingent Rights to operate any railway vehicles registered with Network Rail's rolling stock library.

For the purposes of this contract the railway vehicles specified in paragraph 5.1(a) and 5.1(b) are known as the "Specified Equipment".

### *Train length*

5.2 The Train Operator has a Firm Right to the maximum train length in metres which the Network can from time to time accommodate.

5.3 Nothing in paragraph 5.2 precludes the operation of trains in excess of platform lengths where appropriate measures have been taken to control, so far as is reasonably practicable, any risks introduced by the use of such longer trains.



## 6 Journey Time Protection

Table 6.1: Journey Time Protection

1					2	3	
Service Group - [To be confirmed] <sup>78</sup>							
Service description							
From	To	Via	Description	TSC <sup>79</sup>	Protection Type	Days of the week	Journey Time (in minutes)
Heathrow Tunnel Junction	Heathrow Terminal Station 4	N/A	All stations	[To be confirmed]	MJT	Monday to Sunday	10
Heathrow Terminal Station 4	Heathrow Tunnel Junction	N/A	All stations	[To be confirmed]	MJT	Monday to Sunday	9.5

<sup>78</sup> Please see footnote 65 above.

<sup>79</sup> Please see footnote 66 above.

### *Journey Time protection*

- 6.1 The Train Operator has Firm Rights to Maximum Journey Times under this paragraph 6 only in relation to Passenger Train Slots which are the subject of and comply with Firm Rights under paragraph 2.1 and paragraph 4.1.
- 6.2 In respect of each Service listed in column 1 of Table 6.1, the Train Operator has Firm Rights to a Journey Time on the days listed in column 2, not exceeding the Maximum Journey Time listed in column 3.
- 6.3 The Maximum Journey Times specified in column 3 shall be increased or decreased (as the case may be) by an amount equal to any:
  - (a) increase or decrease in the relevant sectional running times applicable as at the date of this contract;
  - (b) increase or decrease in the relevant station dwell times applicable as at as at the date of this contract; and
  - (c) increase or decrease in the relevant performance allowances, engineering recovery allowances or any other allowances,as such sectional running times, station dwell times or allowances are established and may change in accordance with the Applicable HAL Engineering Access Statement and/or the Applicable HAL Timetable Planning Rules.

## **7 Provisions applicable to Journey Time protection**

### *Network Change*

#### 7.1 If:

- (a) in any Timetable Period, 90 per cent or more of train movements which:
  - (i) are Scheduled in that Timetable Period; and
  - (ii) are Services to which in each case a Maximum Journey Time applies,  
exceed the applicable Scheduled Journey Time; and
- (b) the failure of such train movements to achieve those Scheduled Journey Times is attributable to the condition or operation of the Network,

then a Network Change within the meaning of paragraph (iii) of the definition of Network Change shall be treated as having occurred and the provisions of Part G of the HAL Network Code shall apply:

- (i) as if such Network Change had been proposed by HAL; and
- (ii) as if the revisions to Maximum Journey Times agreed under paragraph 7.2, or determined under paragraph 7.3, subject to any modification under paragraph 7.9, constitute the scope of the relevant Network Change,

and compensation shall be payable to the Train Operator accordingly.

### *Agreement of revised Maximum Journey Time*

7.2 If under paragraph 7.1 a Network Change is treated as having occurred, the parties will try to agree a revised Maximum Journey Time for each such Maximum Journey Time affected by such Network Change.

### *Referral to ADRR*

7.3 If the parties fail to agree such revised Maximum Journey Time(s) within 3 months of the request of either party for revision of the relevant Maximum Journey Time(s), either party may refer the matter for resolution in accordance with the ADRR. The parties shall agree in a Procedure Agreement, as defined in the ADRR, that in performing its function the relevant ADRR Forum must have regard to the following criteria:

- (a) Maximum Journey Times should be as short as is compatible with the development of a safe, reliable and robust timetable; and
- (b) any relevant criteria which may have been published by ORR.

### *Journey Time Review Notice*

7.4 A Journey Time Review Notice is a notice given to the parties by ORR:

- (a) requiring them to enter into negotiations in good faith to vary such Journey Times set out in Table 6.1 as are specified in the notice;

- (b) after consultation with the parties, the Secretary of State, Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) and such other persons as it considers appropriate; and
  - (c) containing its reasons for giving it.
- 7.5 As soon as reasonably practicable after the service of a Journey Time Review Notice, the parties shall begin and in good faith diligently pursue the negotiations in question.
- 7.6 If the parties reach agreement on the variations in question, they shall send a copy of them to ORR for its consent, together with a note of the reasons for them and an explanation of how they are consistent with its statutory duties.
- 7.7 If the parties fail to reach agreement on the variations in question within 45 days of the giving of a Journey Time Review Notice, either party may refer the matter for resolution in accordance with the ADRR. In such a case, the parties shall agree in a Procedure Agreement, as defined in the ADRR, that the relevant ADRR Forum shall reach a determination that is fair and reasonable on the basis of the following criteria:
- (a) Journey Times should be as short as is compatible with the development of a safe, reliable and robust timetable;
  - (b) any relevant criteria which may have been published by ORR; and
  - (c) the reasons for the service of the Journey Time Review Notice given by ORR in that notice.

*Requirement for Office of Rail and Road's consent*

- 7.8 Subject to paragraph 7.9, a variation:
- (a) agreed under paragraph 7.2;
  - (b) agreed or determined as an outcome of a referral for resolution in accordance with the ADRR under any of the provisions of this paragraph 7; or
  - (c) agreed under paragraph 7.6;
- shall have effect:
- (i) only if ORR has given its consent to it; and
  - (ii) from such date as is specified in that consent.

*Office of Rail and Road's Modification Notice*

- 7.9 A Modification Notice is a notice given to the parties by ORR:
- (a) specifying the changes which ORR requires be made to the proposed variations which have been:
    - (i) agreed under paragraph 7.2;

- (ii) agreed or determined as an outcome of a referral for resolution in accordance with the ADRR under any of the provisions of this paragraph 7; or
- (iii) specified in an agreement of the kind referred to in paragraph 7.6;
- (b) after consultation with the parties, the Secretary of State, Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) and such other persons as it considers appropriate; and
- (c) containing its reasons for giving it.

7.10 If a Modification Notice is given, this contract will have effect with the variations referred to in paragraph 7.9(a) as modified in accordance with the terms of the notice.

*Office of Rail and Road's notice for substitution of date/period*

7.11 ORR shall be entitled, by notice to the parties, the Secretary of State and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network), to substitute for any date or period specified in paragraph 7.7, a date which is not more than 180 days later, or a period which is not more than 180 days longer, than that so specified.

*Requirements for notice under paragraph 7.11*

7.12 No notice under paragraph 7.11 may be given unless:

- (a) ORR has consulted the parties, the Secretary of State and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network);
- (b) ORR has taken into account any representations or objections which have been made to it within such period as it has specified for the purpose; and
- (c) where the notice is given after the date or the expiry of the period to which it relates, it is given no later than 30 days after such date or expiry.

## **8 Other rights**

### *Platform rights*

8.1 NOT USED

8.2 NOT USED

### *Connections*

8.3 NOT USED

8.4 NOT USED

### *Departure time ranges*

8.5 NOT USED

*Table 8.4: Firm Rights to Stabling facilities*

<b>1</b>	<b>2</b>	<b>3</b>
<b>Stabling facility</b>	<b>Time available</b>	<b>Specified Equipment</b>
Heathrow Terminal 4 Station	Monday to Saturday from 2330 to 0530	One Class 345 unit
Heathrow Terminal 4 Station	Sunday from 2330 to 0700	One Class 345 unit

*Table 8.4A: Contingent Rights to Stabling facilities*<sup>80</sup>

<b>1</b>	<b>2</b>	<b>3</b>
<b>Stabling facility</b>	<b>Time available</b>	<b>Specified Equipment</b>
Heathrow Terminal 5 Station	At all times	One Class 345 unit

<sup>80</sup> Trains may need to call at Heathrow Terminal 5 Station in the event of an emergency, engineering works, unplanned disruptions or other unforeseen circumstances. TfL therefore requires Contingent Rights in respect of this station.

*Stabling facilities*

8.6 The Train Operator has:

- (a) Firm Rights to use the Stabling facility specified in column 1 of Table 8.4 between the hours specified in column 2 for the purposes of Stabling the Specified Equipment specified in column 3; and
- (b) Contingent Rights to use the Stabling facility specified in column 1 of Table 8.4A for the purposes of Stabling the Specified Equipment specified in column 3.



Table 8.5: Firm Rights to Turnaround times

1					2	3	4
<b>Service Group - [To be confirmed]</b> <sup>81</sup>							
<b>Service description</b>							
Between	And	Via	Description	TSC <sup>82</sup>	Station	Minimum turnaround time	Maximum turnaround time
Heathrow Tunnel Junction	Heathrow Terminal 4 Station	N/A	All stations	[To be confirmed]	Heathrow Terminal 4 Station	7 minutes	28 minutes

Table 8.5A: Firm Rights to Turnaround times<sup>83</sup>

1					2	3	4
<b>Service Group - [To be confirmed]</b> <sup>84</sup>							
<b>Service description</b>							

<sup>81</sup> Please see footnote 65 above.

<sup>82</sup> Please see footnote 66 above.

<sup>83</sup> Trains may need to call at Heathrow Terminal 5 Station in the event of an emergency, engineering works, unplanned disruptions or other unforeseen circumstances. TfL therefore requires Contingent Rights in respect of this station.

<sup>84</sup> Please see footnote 65 above

Between	And	Via	Description	TSC <sup>85</sup>	Station	Minimum turnaround time	Maximum turnaround time
Heathrow Tunnel Junction	Heathrow Terminal 5 Station	N/A	All stations	[To be confirmed]	Heathrow Terminal 5 Station	7 minutes	28 minutes

<sup>85</sup> Please see footnote 66 above.

*Turnaround times*

8.7 The Train Operator has:

- (a) at each station in column 2 of Table 8.5, Firm Rights for each corresponding Service specified in column 1 to a turnaround time equal to or greater than the minimum time specified in column 3 but not exceeding the maximum time specified in column 4; and
- (b) at each station in column 2 of Table 8.5A, in the event the Train Operator requires use of that station, Firm Rights for each corresponding Service specified in column 1 to a turnaround time equal to or greater than the minimum time specified in column 3 but not exceeding the maximum time specified in column 4.

## **SCHEDULE 6: EVENTS OF DEFAULT, SUSPENSION AND TERMINATION**

### **1 Events of Default**

#### *1.1 Train Operator Events of Default*

The following are Train Operator Events of Default:

- (a) the Train Operator ceases to be authorised to be the operator of trains for the provision of the Services in accordance with Clause 3.2(a);
- (b) an Insolvency Event occurs in relation to the Train Operator<sup>86</sup>;
- (c) (i) any breach by the Train Operator of this contract, its Safety Obligations or any of the Collateral Agreements; or  
(ii) any event or circumstance which is reasonably likely to result in any such breach,  
which, by itself or taken together with any other such breach, event or circumstance, HAL reasonably considers constitutes a threat to the safe operation of any part of the Network;
- (d) any Track Charges or other amount due by the Train Operator to HAL under this contract remain unpaid for more than seven days after their due date;
- (e) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to HAL;
- (f) the Train Operator does not satisfy the conditions precedent specified in Clause 3.3(b) in full by the date specified in Clause 3.1; and<sup>87</sup>
- (g) any breach of this contract or any material breach of any of the Collateral Agreements by the Train Operator which, by itself or taken together with any other such breach, results, or is likely to result, in material disruption to train operations of other train operators; and
- (h) the Concession Agreement is terminated.

#### *1.2 Notification*

The Train Operator shall notify HAL promptly on becoming aware of the occurrence of a Train Operator Event of Default.

<sup>86</sup> The reference to the Concessionaire is not necessary as the Train Operator is the Concessionaire in this context.

<sup>87</sup> Please see our comments below on Paragraph 1.3(d).

### 1.3 HAL Events of Default

The following are HAL Events of Default:

- (a) (i) HAL ceases to be authorised to be the operator of the Network by a licence granted under section 8 of the Act unless exempt from the requirement to be so authorised under section 7 of the Act;
- (ii) if HAL is exempt from the requirement to be authorised under section 7 of the Act and such exemption expires or is otherwise withdrawn:
  - (A) HAL fails to obtain a licence permitting it to be the operator of the Network prior to the exemption expiring or being withdrawn; or
  - (B) HAL obtains a licence authorising to be the operator of the Network under section 8 of the Act prior to the exemption expiring or being withdrawn but subsequently ceases to be authorised to be the operator of the Network by such licence (whether by revocation or otherwise);<sup>88</sup>
- (b) an Insolvency Event occurs in relation to HAL or the Operations Agent<sup>89</sup>;
- (c) (i) any breach by HAL of this contract, its obligations under Clause 15A(a), its Safety Obligations or any of the Collateral Agreements;<sup>90</sup> or
- (ii) any event or circumstance which is reasonably likely to result in any such breach,  
which, by itself or taken together with any other such breach, event or circumstance the Train Operator reasonably considers constitutes a threat to the safe operation of the Services or any Ancillary Movements;
- (d) HAL does not satisfy the conditions precedent specified in Clause 3.3(a) in full by the date specified in Clause 3.1;<sup>91</sup> and

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HAL is currently exempt from holding a licence granted under section 8 of the Act. Whilst the duration of this track access agreement ties in with the expiry of this exemption, it is of course possible that the exemption could be withdrawn earlier, meaning this exemption would not be in place for the duration of the term of this contract. Accordingly, this Event of Default has been updated to address this scenario. This is consistent with the approach taken in the Station Access Agreement.

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This Event of Default recognises that HAL intends to subcontract the majority of its obligations under this contract and that the existence of this subcontractor is essential to HAL fulfilling its obligations under this contract.

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As discussed above in relation to Clause 10.2, HAL's licence exemption means that it is not otherwise subject to asset stewardship obligations. TfL therefore considers that a specific HAL Event of Default should also be included that arises where HAL breaches one of the "surrogate licence conditions" proposed to be incorporated into this contract.

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As discussed above in relation to Clause 3, TfL considers that a failure by HAL to satisfy the conditions precedent by the specified date should constitute a HAL Event of Default. In the event that this HAL Event of Default occurs, TfL should then be entitled to claim

- (e) any breach of this contract or any material breach of any of the Collateral Agreements by HAL which, by itself or taken together with any other such breach, results, or is likely to result, in material financial loss to the Train Operator.

#### 1.4 *Notification*

HAL shall notify the Train Operator promptly on becoming aware of the occurrence of a HAL Event of Default.

## **2 Suspension**

### 2.1 *Right to suspend*

2.1.1 HAL may serve a Suspension Notice where a Train Operator Event of Default has occurred and is continuing.

2.1.2 The Train Operator may serve a Suspension Notice where a HAL Event of Default has occurred and is continuing.

### 2.2 *Contents of Suspension Notice*

A Suspension Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) the date and time at which suspension is to take effect;
- (c) in the case of a Suspension Notice served on the Train Operator, reasonable restrictions imposed while the Suspension Notice is in force on the permission to use the Network;
- (d) in the case of a Suspension Notice served on HAL, details of any necessary suspension of the Services; and
- (e) whether the party serving the Suspension Notice reasonably considers that the Event of Default is capable of remedy, and where the Event of Default is capable of remedy:
  - (i) the steps reasonably required to remedy the Event of Default; and
  - (ii) a reasonable grace period for the defaulting party to remedy it (where the Event of Default which has occurred is a failure to pay Track Charges or other amount due, seven days shall be a reasonable grace period).

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damages to compensate it for the delay in being able to access the Network. This contract will need to be updated to include this mechanism. An equivalent Train Operator Event of Default has been included above as Paragraph 1.1(f) and HAL would be entitled to claim any costs it incurs as a result of such breach.

### 2.3 *Effect of Suspension Notice served by HAL*

Where HAL has served a Suspension Notice on the Train Operator:

- (a) the Train Operator shall comply with any reasonable restrictions imposed on it by the Suspension Notice;
- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from HAL to the Train Operator under paragraph 2.5.4;
- (c) service of the Suspension Notice shall not affect the Train Operator's continuing obligation to pay the Track Charges; and
- (d) service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purposes of Part D of the Network Code.

### 2.4 *Effect of a Suspension Notice served by the Train Operator*

Where the Train Operator has served a Suspension Notice on HAL:

- (a) it shall have the effect of suspending the Train Operator's permission to use the Network to provide the Services to the extent specified in the Suspension Notice;

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- (b) the Suspension Notice shall remain in full force and effect in accordance with its terms until it has been revoked either in whole or in part by notice from the Train Operator to HAL under paragraph 2.5.4; and
- (c) the service of the Suspension Notice shall not affect the Train Operator's Firm Rights (as defined in Schedule 5) for the purposes of Part D of the Network Code.

### 2.5 *Suspension to be proportionate to breach*

2.5.1 A Suspension Notice served under paragraph 2.3 in respect of any of the Train Operator Events of Default specified in paragraphs (a) and (c) to (f) (inclusive) of paragraph 1.1 shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services;
- (c) Network; and
- (d) categories of train movements or railway vehicles,

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This paragraph has been deleted as the Fixed Track Charge is not applicable to this contract. However, this contract will need to include an alternative abatement mechanism or similar so that the Train Operator is not paying for services during a suspension period. The contract will need to be updated accordingly once the charges regime in Schedule 7 has been finalised.

(or (as the case may be) parts or part of them) to which the relevant Train Operator Event of Default relates.

2.5.2 A Suspension Notice served under paragraph 2.4 in respect of any of the HAL Events of Default specified in paragraphs 1.3(a), (c) and (d) shall, so far as reasonably practicable, apply only to the:

- (a) railway vehicles;
- (b) Services;
- (c) Network; and
- (d) categories of train movements or railway vehicles,

(or (as the case may be) parts or part of them) to which the relevant HAL Event of Default relates.

2.5.3 The party served with a Suspension Notice which specifies an Event of Default which is capable of remedy shall:

- (a) with all reasonable diligence, take such steps as are specified in the Suspension Notice to remedy the Event of Default; and
- (b) keep the party serving the Suspension Notice fully informed of the progress which is being made in remedying the Event of Default.

2.5.4 Where a party served with a Suspension Notice has complied with its obligations under paragraph 2.5.3 (whether in whole or in part) and it is reasonable for the suspension effected by the Suspension Notice to be revoked (whether in whole or in part), the party which served the Suspension Notice shall revoke the suspension to that extent. Such revocation shall be effected as soon as practicable after the remedy in question by notice to the other party specifying the extent of the revocation and the date on which it is to have effect.

### **3 Termination**

#### **3.1 HAL's right to terminate**

HAL may serve a Termination Notice on the Train Operator:

- (a) where the Train Operator fails to comply with any material restriction in a Suspension Notice;
- (b) where the Train Operator fails to comply with its obligations under paragraph 2.5.3;
- (c) where the Train Operator Event of Default specified in paragraph 1.1(a) has occurred and is continuing; or
- (d) where the Train Operator Event of Default specified in a Suspension Notice served by HAL is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.



### 3.2 *Train Operator's right to terminate*

The Train Operator may serve a Termination Notice on HAL:

- (a) where HAL fails to comply with its obligations under paragraph 2.5.3;
- (b) where the HAL Event of Default specified in paragraph 1.3(a) has occurred and is continuing; or
- (c) where the HAL Event of Default specified in a Suspension Notice served by the Train Operator is not capable of being remedied and three months have elapsed from the service of that Suspension Notice.

### 3.3 *Contents of Termination Notice*

A Termination Notice shall specify:

- (a) the nature of the relevant Event of Default;
- (b) a date and time, which shall be reasonable in the circumstances, at which termination is to take effect; and
- (c) whether the party serving the Termination Notice reasonably considers that the Event of Default is capable of remedy, and where the relevant Event of Default is capable of remedy:
  - (i) the steps which the party serving the Termination Notice believes are reasonably required to remedy the Event of Default; and
  - (ii) a reasonable grace period within which such steps may be taken (where the Event of Default is a failure of the Train Operator to pay Track Charges or other amounts due, seven days is a reasonable grace period).

### 3.4 *Effect of Termination Notice*

Where HAL or the Train Operator has served a Termination Notice on the other:

- (a) the service of the Termination Notice shall not affect the parties' continuing obligations under this contract up to the date of termination, which date shall be determined in accordance with paragraph 3.4(c);
- (b) the party which has served the Termination Notice shall withdraw it by notice to the other party, upon being reasonably satisfied that the relevant Event of Default has been remedied; and
- (c) this contract shall terminate on the later of:
  - (i) the date and time specified in the Termination Notice for the contract to terminate (or such later date and time as the party which served the Termination Notice notifies to the other before the date and time so specified); and
  - (ii) the date on which a copy of the Termination Notice is given to ORR.

## **4 Consequence of termination**<sup>93</sup>

### **4.1 *Directions regarding location of Specified Equipment***

Immediately before, upon or following termination or expiry of this contract, the Train Operator shall comply or procure compliance with all reasonable directions given by HAL concerning the location of the Specified Equipment.

### **4.2 *Failure to comply with directions***

If the Train Operator fails to comply with any directions given under paragraph 4.1, HAL shall be entitled to remove from the Network or Stable any Specified Equipment left on the Network or to instruct a third party to do so and any reasonable costs incurred by HAL in taking such steps shall be paid promptly by the Train Operator.

### **4.3 *Evidence of costs***

HAL shall provide such evidence of such costs as are referred to in paragraph 4.2 as the Train Operator shall reasonably request.

<sup>93</sup>

This contract is currently silent on the costs that will be incurred by TfL in the event these access arrangements are terminated as a result of a HAL Event of Default (for example costs relating to the reallocation of vehicles and staff, reputational damage and/or compensation claims from connecting operators). These costs would not be insignificant and TfL proposes that the contract be updated to expressly provide for such compensation to be payable.

## SCHEDULE 7: TRACK CHARGES AND OTHER PAYMENTS

TfL's principles for its proposed track access charging regime are as follows:

This schedule of the Track Access Contract will set out the Track Access Charge that will be payable for services using the Heathrow Rail Infrastructure to and from HAL's Tunnel Portal to the Terminal 4 station, via the CTA station.

A "per train movement" charge of **£25.68** (in 2015/6 prices) for use of the track infrastructure between the Tunnel portal and HAL's Terminal 4 station<sup>94</sup> (where a train movement represents a single "one-way" trip from the tunnel portal to the Terminal 4 station or vice versa). Such a charge will apply to Class 345 units in standard 9 car formation<sup>95</sup>.

For each 4 weekly railway reporting period, the total track charge that the Crossrail train operator will be required to pay for running this service shall be calculated in accordance with the following formula:

$$\text{Total Track Charge} = \text{Rail Period Movements} * \text{HAL Track Charge}$$

where:

**Rail Period Movements** is the total number of movements made by Crossrail per railway reporting period; and

**HAL Track Charge** is the HAL Track Charge per movement of £25.68.

The HAL Track Charge is calculated in 2015/16 prices. For years commencing 1 April 2016 onwards, the Track Charge will follow the standard terms of annual indexation used by Network Rail, as set out below:

$$T_t = T_{t-1} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

<sup>94</sup> Whilst there is no scheduled Crossrail service to Terminal 5, it is possible that Crossrail services will need to access the Extended HAL Tunnel (i.e. the track infrastructure extending to Terminal 5 defined in HAL's Network Statement) in exceptional circumstances. For example, in the event that Terminal 4 cannot be accessed by Crossrail services, access to the Extended HAL Tunnel may be required in order to turn trains around. In this event, we propose that the same charge (£25.68 per movement) is levied by HAL on Crossrail services, given that Extended HAL Tunnel is similar in length to the tunnel between the CTA and Terminal 4. Since there are no plans for Crossrail services to call at the Terminal 5 station, we do not (at this stage) propose establishing a Station Charge for access to the Terminal 5 station.

<sup>95</sup> We propose that HAL levies only a single charge to recover non-station related OMR costs (including electrification assets) rather than two separate charges (one for electrification assets and one for track, civils and signalling assets, as is the case on Network Rail infrastructure) because all Crossrail services will be electrified. Therefore, all Crossrail services should be expected to contribute to the recovery of electrification OMR costs that HAL incurs as a result of them operating.

$T_t$  is the Track Charge in year t;

$RPI_{t-1}$  means the RPI CHAW published or determined with respect to the month of November in relevant year t-1; and

$RPI_{t-2}$  means the RPI CHAW published or determined with respect to the month of November in relevant year t-2.

The payment of charges will follow the same terms (including periodicity, timing and set off) as stated in Schedule 7, Section 10 of Network Rail's model clauses Track Access Agreement.

## **10 Payment of Track Charges and other sums due under the contract<sup>96</sup>**

### **10.1 *Payment of Track Charges and other sums due under the contract***

- (a) Save where the contract provides otherwise, the Train Operator shall pay or procure the payment to HAL of:
  - (i) the Variable Usage Charge;
  - (ii) the Traction Electricity Charge; and
  - (vi) any other sums which have fallen due in accordance with any provision of this contract,  
attributable to any Period as invoiced by HAL on or after expiry of each such Period within 21 days of the invoice date or 28 days after the end of the Period, whichever is later.
- (b) NOT USED.
- (c) Any invoice issued by HAL under paragraph 18.5 of the Traction Electricity Rules (relating to modelled and actual rates of electricity consumption) shall be payable by the Train Operator within 21 days of the relevant invoice date.

### **10.2 *NOT USED***

### **10.3 *Invoices and right to object to invoices***

- (a) NOT USED
- (b) For each Period, HAL shall be entitled to invoice the Train Operator for Variable Charges in respect of any and all train movements operated by the Train Operator. Each such invoice will be payable in accordance with the provisions of paragraph 10.1.
- (c) NOT USED.
- (d) NOT USED.
- (e) NOT USED.
- (f) NOT USED
- (g) NOT USED.

### **10.4 *NOT USED***

### **10.5 *Disputed amounts repayment and interest rate***

<sup>96</sup> We have included the Network Rail template payment terms in this document (amended as appropriate to reflect the arrangements under this contract).

- (a) Where a party wishes to contest any invoice issued to it under this Schedule 7 (including any invoice in respect of Track Charges) it shall, within 14 days of receipt of the invoice, notify the other party in writing of the amount which is in dispute but shall pay the full amount of the invoice, including the disputed amount, in accordance with the terms of the invoice.
- (b) Where a party has given notice under paragraph 10.5(a) that it disputes part of any invoiced amount:
  - (i) payment of such sum shall be without prejudice to the determination of whether such sum is properly due or not; and
  - (ii) if it is subsequently determined that the disputed sum, or part of it, was not properly due the payee shall repay the disputed sum, or relevant part, to the payer together with interest (to accrue daily and be compounded monthly) at the Default Interest Rate from the date of payment until the actual date of repayment.
- (c) NOT USED.

## SCHEDULE 8: PERFORMANCE REGIME

TfL's principles for its track access performance regime are as follows:

This schedule of the HAL Track Access Agreement will set out the principles of the performance regime which operates on the Heathrow Rail Infrastructure.

The performance regime details the mechanisms through which industry parties - both the IM, in this case HAL, and train operators (TOCs) - are compensated for poor performance and/or rewarded for good performance.

The performance regime for the Heathrow Rail Infrastructure shall follow the same broad principles as the performance regime set out in Schedule 8 of the Network Rail template (or model clauses) Track Access Agreement. In particular the following principles directly follow those detailed in Schedule 8:

1. **Measure of performance** – performance shall be measured on an “Average Minutes Lateness” basis relative to the published timetable, as defined in Network Rail’s Schedule 8. These minutes will then be attributed to the responsible parties pro rata to so-called “Delay minutes” relative to the published timetable;
2. **Benchmark levels of performance** – actual performance will be assessed against an “expected performance” benchmark<sup>97</sup> where industry parties are expected to deliver services at a certain “expected” level (this can be adjusted over time and can be aligned to targets set out elsewhere). It should be stressed that “expected”, refers to the level of performance that should be deliverable by industry parties, given (i) the technology, funding etc available to them and (ii) assuming that industry parties are effective and efficient. This is consistent with the type of benchmarks established as part of Network Rail’s Schedule 8;
3. **Timescale of measurement** – performance shall be measured on an average basis over each reporting period as set out in Network Rail’s Schedule 8;
4. **Payment rates** – payment rates, as in Network Rail’s Schedule 8, will be calibrated to reflect the long-term revenue effects associated with a change in performance relative to the benchmark (based on Average Minutes Lateness across the service). These revenue effects include losses experienced “on the day” as well the impact on demand via longer term reputational effects for both on and off network effects<sup>98</sup>. Payment rates will need to be estimated “ex-ante” for May 2018. We propose re-calibrating once Crossrail services are in operation but without a retrospective wash-up;

<sup>97</sup> The precise details of which are to be confirmed.

<sup>98</sup> It should be noted that calibration of payment rates in this way may not completely compensate affected parties for performance payments incurred when presenting to another network. TfL is willing in principle to accept this risk, but notes that this is a problem systemic to all rail network interfaces in Britain. Given the “whole-industry” nature of the issue, TfL believes that such an issue requires a “whole-industry” body such as the ORR or the Rail Delivery Group to organise and determine an appropriate solution.

5. **Indexation** – each payment rate shall be adjusted in respect of Periods in Relevant Year t in accordance with the following formula:

$$R_t = R_{t-1} \cdot \left( 1 + \frac{(RPI_{t-1} - RPI_{t-2})}{RPI_{t-2}} \right)$$

where:

$R_t$  is the relevant rate in the Relevant Year t;

$R_{t-1}$  is the relevant rate in the Relevant Year t-1;

$RPI_{t-1}$  means the RPI CHAW published or determined with respect to the month of November in Relevant Year t-1; and

$RPI_{t-2}$  means the RPI CHAW published or determined with respect to the month of November in Relevant Year t-2.

6. **Sustained Poor Performance (SPP)** – a “lower bound” of performance will also be specified, which if breached, means that a SPP regime comes into force as on Network Rail infrastructure. This would allow industry parties to claim for incremental “actual losses” parties if standard performance payments (under the liquidated sums regime exceed a given amount over a specified time period)<sup>99</sup> do not cover actual losses. However, in contrast to Sustained Poor Performance Regime of Network Rail the IM will also be contractually obliged to put a clear mitigation plan in place; and
7. **“On-network” delay attribution** – the performance regime uses a so-called “TOC-on-self” regime and “star model” for attributing delay “on-network”<sup>100</sup>. This works following two key principles: (i) HAL pays out for all performance deviations it causes as well as all TOC-on-TOC deviations (i.e. where the perpetrator TOC and the TOC experiencing delay are different operators) and (ii) TOCs compensate HAL for TOC-on-self deviations (i.e. where the perpetrator TOC and the TOC experiencing delay are the same operator)<sup>101</sup>.

Given that services which operate on the Heathrow Rail Infrastructure will also run on adjoining Network Rail infrastructure, the principles of Network Rail’s Schedule 8 need to be supplemented to take account of “cross-network” interactions. In particular:

- **“Cross-network” delay attribution** – delay attribution across networks should follow three broad principles:

<sup>99</sup> Precise threshold level to be determined.

<sup>100</sup> “on-network” is defined as delays caused on the Heathrow Rail Infrastructure which affect industry parties also operating on the Heathrow Rail Infrastructure.

<sup>101</sup> Where TOC-on-self deviations from the performance benchmark are the deviation in performance felt by the TOC that caused the deviation.



- (i) wherever possible, delay is attributed to the prime incident;
- (ii) delay attribution should be consistent for both performance monitoring and performance regime purposes; but that
- (iii) *for performance regime purposes (but not necessarily delay attribution purposes)* a train operator that presents late to either network (HAL or Network Rail) by X minutes is attributed X minutes of delay, regardless of the root cause.

In respect of point (iii), train operator benchmarks will need to recognise that infrastructure managers could cause train operators to present late at the infrastructure boundary; and

- **Contractual structure** – the “star” models of each infrastructure manager will effectively be linked through train operators. Each train operator has a contract with the infrastructure manager whose infrastructure it uses (as in the star model implemented by Network Rail), and so by construction, the train operators that use two or more pieces of infrastructure have two or more contractual relations which will “link” the star models. Hence, if a payment is required to be made between infrastructure managers, this will be made through a train operator that uses both pieces of infrastructure.

To date, HAL has maintained that there is no requirement for a Schedule 4 regime, as it only intends to undertake engineering work in so-called “white periods” (i.e. non-service periods). Whilst our preference would be that a Schedule 4 regime is established in order to maintain consistency with wider industry practice, we would be willing to accept an arrangement in which compensation for planned disruption is provided under an alternative part of the contract.

However, we emphasise that – regardless of where in the contract the arrangements are set out – it is essential that a regime that provides appropriate compensation in instances of planned disruption during service periods is established in respect of the Heathrow Rail Infrastructure. This will ensure that operators are afforded the appropriate protections in the event of planned disruption affecting their services. Equally importantly, it will mean that HAL is incentivised to manage the operational disruption associated with engineering work efficiently.

We therefore propose that there is no separate possessions regime in Schedule 4. Instead, we propose that the Crossrail operator will be compensated in the case of possessions being made outside of “white periods” in line with arrangements for unplanned disruption, as set out in Schedule 8. Lateness caused by possessions outside of the “white periods” will be calculated by reference to the published timetable for the relevant period and to services cancelled, retimed or otherwise disrupted. Should the nature of the possession mean that the timetable is yet to be

published for the relevant period, lateness will be measured against the most appropriate reference timetable available<sup>102</sup>.

We expect calibration of the performance regime parameters (payment rates, benchmarks, Sustained Poor Performance thresholds and so forth) – together with detailed legal drafting of the regime – to take place following the endorsement of these principles by ORR. Thereafter, we would anticipate regime parameters and drafting to be validated by ORR.

TfL's principles for its review process are as follows:

Our proposed review process for Schedule 8 benchmarks and payments rates is set out below. There will not be a review process for track and station access charges levied by HAL on train operators, which will be fixed for the duration of the contract. There will not be a review process for track and station access charges levied by HAL on train operators, which will be fixed for the duration of the contract.

- The onus will be on the party seeking to trigger a review to issue a review notice demonstrating a “material” financial loss would occur, or is continuing to occur.
- In order for payment rates or benchmarks to be subject to review, one of more of the following “material” changes would need to occur:
  1. A new entrant operating services on the Heathrow Rail Infrastructure;
  2. Actual service volumes being +/- X% above or below the level expected at the time of setting performance benchmarks;
  3. A material error in the underlying data/calculations used in establishing performance regime benchmarks or payment rates is discovered; or
  4. A material enhancement to the capability or capacity of the Heathrow Rail Infrastructure occurs.
- Following completion of the review, the revised payment rates and benchmarks will apply from the date of the “material” change if prospective. If retrospective they will have immediate effect with the parties agreeing an adjustment from the date of the review notice until the completion of the review.

<sup>102</sup> The precise determination of what the most appropriate timetable to use for reference will be made on a case-by-case basis.

- Where parties do not agree the case will be dealt with under the contractual dispute resolution mechanism.

## SCHEDULE 9: LIMITATION ON LIABILITY

### 1 Definitions

In this Schedule

“**Contract Year**” means each yearly period commencing on [x]<sup>103</sup> May 2018 and subsequently on each anniversary of such date; and

“**Liability Cap**” means:

- (a) in relation to the first Contract Year, the sum of £155 million<sup>104</sup>; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 * \left( \frac{RPI_n}{RPI_1} \right)$$

where:

- (i)  $C_1$  is the sum of £155 million;
- (ii)  $C_n$  is the Liability Cap in the nth subsequent Contract Year;
- (iii)  $RPI_n$  is the Retail Prices Index (as defined in Schedule 7) published or determined with respect to the first month of the subsequent Contract Year n; and
- (iv)  $RPI_1$  is the Retail Prices Index (as defined in Schedule 7) published or determined with respect to the month in which this contract became effective under Clause 3.1.

### 2 Application

The limitations on liability contained in this Schedule apply in the circumstances set out in Clause 11.5.

### 3 Limitation on HAL’s liability

In relation to any claim for indemnity made by the Train Operator to which this Schedule 9 applies:

- (a) HAL shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and HAL shall have no further liability for it.

<sup>103</sup>

Please see our comments above on Clause 3.1.

<sup>104</sup>

This is the liability cap proposed by HAL in the draft Track Access Agreement it provided to TfL in September 2015. This level of liability is acceptable to TfL.

#### **4 Limitation on Train Operator's liability**

In relation to any claims for indemnity made by HAL to which this Schedule 9 applies:

- (a) the Train Operator shall not be liable to make payments in relation to such claims which are admitted in writing or finally determined in any Contract Year to the extent that its liability for such claims exceeds the Liability Cap for such Contract Year; and
- (b) to the extent its liability for such claims exceeds the Liability Cap for such Contract Year, any claim for payment of a sum which exceeds such Liability Cap shall be extinguished and the Train Operator shall have no further liability for it.

#### **5 Disapplication of limitation**

To the extent that any Relevant Losses:

- (a) result from a conscious and intentional breach by a party; or
- (b) are in respect of obligations to compensate any person for liability for death or personal injury, whether resulting from the negligence of a party or the negligence of any of its officers, employees or agents or from a failure by a party to comply with its Safety Obligations,

such Relevant Losses:

- (i) shall not be subject to the limitation of liability in Schedule 9; and
- (ii) shall not be taken into account when calculating the amount of Relevant Losses in respect of claims admitted or finally determined in a Contract Year for the purposes of the limitations of liability in this Schedule 9.

#### **6 Exclusion of legal and other costs**

The limits on the parties' liabilities provided for in paragraphs 3 and 4 shall not apply to costs incurred in recovering any amount under a relevant claim, including legal, arbitral and other professional fees and expenses.

#### **7 Exclusion of certain Relevant Losses**

A party shall have no claim for Relevant Losses to the extent that such Relevant Losses result from its own negligence or breach of this contract.

#### **8 Continuing breaches**

Nothing in this Schedule 9 shall prevent a party making a new claim for indemnity in respect of a continuing breach of contract which:

- (a) is a continuing breach of contract which continues for more than 12 months;
- (b) is a continuing breach of contract which continues beyond a period within which it might reasonably be expected to have been remedied; or
- (c) is a breach of a Performance Order in relation to a breach of contract,

but any such new claim shall not include any sum which was the subject matter of a previous claim and was extinguished by virtue of paragraph 3(b) or 4(b).

## **9 Final determination of claims**

For the purpose of this Schedule 9, a determination of a claim for Relevant Losses by a Court or other tribunal shall be treated as final when there is no further right of appeal or review from such determination or in respect of which any right of appeal or review has been lost, whether by expiry of time or otherwise.

## **SCHEDULE 10: NETWORK CODE AND TRACTION ELECTRICITY MODIFICATIONS**

### **1 Automatic effect**

#### *1.1 General*

This contract shall have effect:

- (a) with the modifications; and
- (b) from the date,

specified by ORR in a modification notice as supplemented (where appropriate) by a notice of consent to requisite adaptations or a notice of determined requisite adaptations.

#### *1.2 Retrospective effect*

No relevant notice may have retrospective effect.

### **2 Modification notice**

#### *2.1 Meaning*

A modification notice is a notice given by ORR to the parties for the purposes of this contract which modifies specified provisions of this contract (other than this Schedule 10) by making such modifications as are consequential upon, or necessary to give full effect to, any change to the Network Code or the Traction Electricity Rules.

#### *2.2 Contents of modification notice*

A modification notice shall state:

- (a) the modifications which are to be made to this contract;
- (b) the date from which specified modifications are to have effect; and, if any such modifications are to have effect from different dates, the dates applicable to each modification; and
- (c) which of the specified modifications are to be subject to adaptation and the backstop date for the requisite adaptations in question.

### **3 Adaptation procedure**

#### *3.1 Application*

This paragraph 3 applies in the case of specified modifications which are specified as being subject to adaptation.

#### *3.2 Negotiation of adaptations*

In respect of the modifications in each modification notice:

- (a) within 14 days of the date of service of the relevant modification notice, the parties shall meet and in good faith negotiate and attempt to agree the requisite adaptations;

- (b) each party shall ensure that:
  - (i) such negotiations are conducted in good faith in a timely, efficient and economical manner, with appropriate recourse to professional advice; and
  - (ii) ORR's criteria are applied in the negotiations; and
- (c) the negotiations shall not continue after the backstop date.

### 3.3 *Agreed adaptations - notice to the Office of Rail and Road*

If the parties have agreed the requisite adaptations on or before the backstop date, not later than seven days after the backstop date the agreed requisite adaptations shall be sent by the parties to ORR for its consent, together with a statement, signed by or on behalf of both parties:

- (a) stating the reasons for the agreed requisite adaptations;
- (b) stating the extent to which and ways in which ORR's criteria have been applied in arriving at the agreed requisite adaptations and, in any case where they have not been applied, the reasons; and
- (c) giving ORR such other information as ORR may have requested.

### 3.4 *Agreed adaptations – Office of Rail and Road's consent*

If ORR is satisfied with the agreed requisite adaptations, and it gives a notice of consent to requisite adaptations, they shall have effect as provided for in paragraph 3.8.

### 3.5 *Agreed requisite adaptations – Office of Rail and Road's refusal of consent*

If ORR gives notice to the parties that it is not satisfied with any or all of the agreed requisite adaptations, it may:

- (a) require the parties again to follow the procedure for negotiating requisite adaptations (with such modifications as to time limits as it specifies), in which case they shall do so; or
- (b) determine the requisite adaptations itself.

### 3.6 *Requisite adaptations - failure to agree or submit*

If the parties have failed to submit agreed requisite adaptations to ORR for its consent within seven days after the backstop date, it may determine the requisite adaptations itself.

### 3.7 *Notice of determined requisite adaptations*

A notice of determined requisite adaptations is a notice:

- (a) given by ORR to the parties for the purposes of this paragraph 3 following the failure of the parties to send to ORR within seven days of the backstop date requisite adaptations to which it gives its consent; and
- (b) which states the requisite adaptations which ORR has determined should be made using its powers to do so under paragraph 3.5 or 3.6.



### 3.8 *Effect of requisite adaptations*

Requisite adaptations established either:

- (a) by agreement of the parties and in respect of which ORR has given a notice of consent to requisite adaptations under paragraph 3.4; or
- (b) by the determination of ORR under paragraph 3.5 or 3.6 and stated in a notice of determined requisite adaptations,

shall have effect from such date as ORR states in the relevant notice of consent to requisite adaptations or (as the case may be) the relevant notice of determined requisite adaptations.

## 4 **Procedural matters**

### 4.1 *More than one notice*

More than one modification notice may be given.

### 4.2 *Differences etc as to requisite adaptations*

Any difference or question as to whether any thing is a requisite adaptation shall be determined by ORR:

- (a) on the application of either party; and
- (b) in accordance with such procedure (including as to consultation) as ORR may by notice to the parties determine.

### 4.3 *Co-operation and information*

If ORR gives notice to either or both of the parties that it requires from either or both of them information in relation to any requisite adaptation or proposed requisite adaptation:

- (a) the party of whom the request is made shall provide the requested information promptly and to the standard required by ORR; and
- (b) if that party fails timeously to do so, ORR shall be entitled to proceed with its consideration of the matter in question and to reach a decision in relation to it without the information in question and the party in default shall have no grounds for complaint in that respect.

### 4.4 *Office of Rail and Road's criteria*

In relation to the negotiation of any requisite adaptation, ORR shall be entitled to:

- (a) give to the parties any criteria which it requires to be applied in the negotiations; and
- (b) modify the criteria after consultation.

### 4.5 *Procedural modifications*

In relation to the procedure in paragraph 3 for the agreement or establishment of requisite adaptations (including the times within which any step or thing requires to be done or achieved):

- (a) such procedure may be modified by ORR by a notice of procedural modification given by it to the parties; but

- (b) ORR may give a notice of procedural modification only if it is satisfied that it is necessary or expedient to do so in order to promote or achieve the objectives specified in section 4 of the Act or if such a notice is requested by both parties.

#### 4.6 *Dates*

In this Schedule 10:

- (a) where provision is made for a date to be specified or stated by ORR it may, instead of specifying or stating a date, specify or state a method by which a date is to be determined, and references to dates shall be construed accordingly; and
- (b) any notice given by ORR which states a date may state different dates for different purposes.

#### 4.7 *Requirement for prior consultation*

No relevant notice shall have effect unless:

- (a) ORR has first consulted the parties<sup>105</sup> and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) in relation to the proposed relevant notice in question;
- (b) in the consultations referred to in paragraph 4.7(a), ORR has made available to the parties and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) such drafts of the proposed relevant notice as it considers are necessary so as properly to inform them of its contents;
- (c) ORR has given each party and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) the opportunity to make representations in relation to the proposed relevant notice and has taken into account all such representations (other than those which are frivolous or trivial) in making its decision on the relevant notice to be given;
- (d) ORR has notified the parties and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) as to its conclusions in relation to the relevant notice in question (including by providing to each such person a copy of the text of the proposed relevant notice) and its reasons for those conclusions; and
- (e) in effecting the notifications required by paragraph 4.7(d), ORR has treated as confidential any representation (including any submission of written material) which (and to the extent that) the person making the

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References to the Secretary of State are not applicable in Schedule 10 (as the Secretary of State is not the concessioning authority) and these references have therefore been deleted. Other references to the Secretary of State in this contract have been retained as they do not impose an obligation on the Secretary of State, the Train Operator or HAL.

representation, by notice in writing to ORR or by endorsement on the representation of words indicating the confidential nature of such representation, has specified as confidential information.

#### 4.8 *Consolidated contract*

Not later than 28 days after the giving of the last of:

- (a) a modification notice; and
- (b) a notice of determined requisite adaptations or a notice of consent to requisite adaptations (as the case may be),

HAL shall prepare and send to the Train Operator, ORR and Transport for London (or such Affiliate of Transport for London responsible for the procurement of passenger rail services on the Network) a copy of this contract as so modified.

#### 4.9 *Saving*

Nothing in this Schedule 10 affects:

- (a) the right of either party to approach and obtain from ORR guidance in relation to the requisite adaptations; or
- (b) the right of ORR at any time to effect modifications to either the Network Code under Condition C8 of that code, or the Traction Electricity Rules pursuant to the provisions contained therein.

### 5 **Definitions**

In this Schedule 10:

- “backstop date”** means the date (being not earlier than 28 days from the date of the modification notice) specified as such in a modification notice (or such later date as may be established under paragraph 3.5(a) or 4.6);
- “modification notice”** has the meaning ascribed to it in paragraph 2.1;
- “notice of consent to requisite adaptations”** means a notice given by ORR under paragraph 3.4;
- “notice of determined requisite adaptations”** has the meaning ascribed to it in paragraph 3.7;
- “notice of procedural modification”** means a notice given by ORR to the parties under paragraph 4.5 modifying any aspect of the procedure in this Schedule 10 for the agreement or establishment of requisite adaptations;
- “ORR’s criteria”** means the criteria established by ORR for the purposes of the negotiation of requisite adaptations and given to the parties, or modified, under paragraph 4.4;

**“relevant notice”** means a modification notice, notice of determined requisite adaptations, notice of procedural modification or notice of modification of ORR’s criteria;

**“requisite adaptations”** in relation to specified modifications, means the amendments (including the addition of information) to the provisions in question which are necessary or expedient so as to give full effect to them in the particular circumstances of the case, and **“adaptation”** shall be construed accordingly; and

**“specified”** means specified in a modification notice.

**IN WITNESS** whereof the duly authorised representatives of HAL and the Train Operator have executed this contract on the date first above written.

Signed by .....

Print name .....

Duly authorised for and on behalf of  
HEATHROW AIRPORT LIMITED

Signed by .....

Print name .....

Duly authorised for and on behalf of  
TRANSPORT FOR LONDON OR A RAILWAY UNDERTAKING NOMINATED BY  
TRANSPORT FOR LONDON (CURRENTLY MTR CORPORATION (CROSSRAIL)  
LIMITED)